SUPPORTING DOCUMENT No. 4

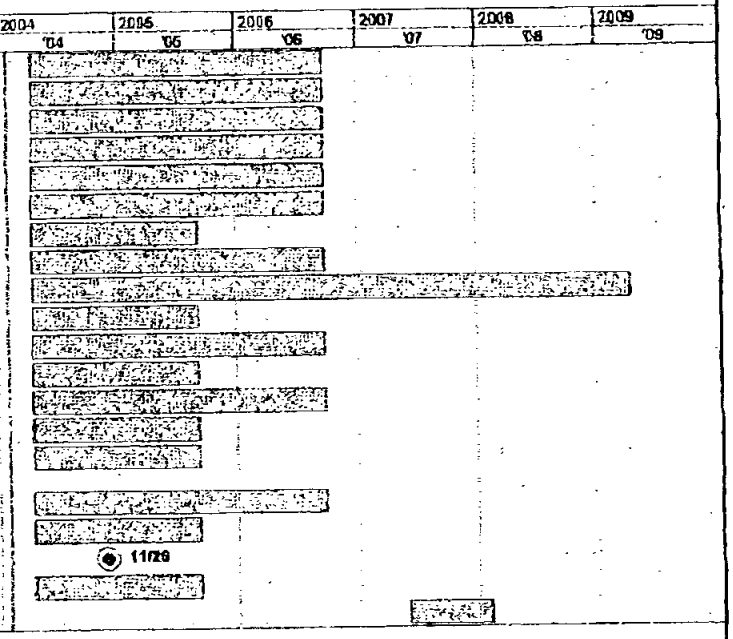
Written Comments

A document presented to the Regional Board on February 11, 2004.
All written comments received prior to 5:00 pm on January 28, 2004, including comments from:

a. The Building Industry Association of Southern California
b. The City of Temecula
c. The Riverside County Flood Control and Water Conservation District

Proposed Compliance Schedule

ID	PERMIT ID	Task Name	Duration	Start	Finish
1	2.D	**Legal Authority Approval Process**	640 days	Wed 4/14/04	Tue 9/26/06
2		Certified legal statement	640 days	Wed 4/14/04	Tue 9/26/06
3	2.E	**SWMP development and implementation**	640 days	Wed 4/14/04	Tue 9/26/06
4		Individual Local SWMP	640 days	Wed 4/14/04	Tue 9/26/06
5		Watershed SWMP	640 days	Wed 4/14/04	Tue 9/26/06
6		SWMP Development, adoption and implementation	640 days	Wed 4/14/04	Tue 9/26/06
7	2.F	**Develop Development Planning Program**	365 days	Wed 4/14/04	Tue 9/6/05
8		Revise New Development Ordinances	640 days	Wed 4/14/04	Tue 9/26/06
9	2.F.2.b.9	Numeric Sizing Criteria	1305 days	Wed 4/14/04	Tue 4/14/09
10	2.G	**Construction Program Development**	365 days	Wed 4/14/04	Tue 9/6/05
11		Grading ordinance update	640 days	Wed 4/14/04	Tue 9/26/06
12	2.H	**Develop Existing Development Program**	365 days	Wed 4/14/04	Tue 9/6/05
13		Modify ordinances to reflect program	640 days	Wed 4/14/04	Tue 9/26/06
14	2.I	**Public Education Program Development**	365 days	Wed 4/14/04	Tue 9/6/05
15	2.J	**Illicit Discharge Detection and Elimination Program Development**	365 days	Wed 4/14/04	Tue 9/6/05
16		Modify ordinances to reflect program	640 days	Wed 4/14/04	Tue 9/26/06
17	2.K	**Watershed-based Activities**	365 days	Wed 4/14/04	Tue 9/6/05
18	2.L	**SWMP Annual Report**	0 days	Fri 11/26/04	Fri 11/26/04
19	Attach B.	**Monitoring**	365 days	Wed 4/14/04	Tue 9/6/05
20		ROWD	180 days	Fri 6/1/07	Thu 2/7/08



January 28, 2004

Megan Quigley
Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Comments on Municipal Storm Water Permit for Santa Margarita Watershed

Dear Ms. Quigley:

On behalf of the more than 3,300 member companies of the Construction Industry Coalition on Water Quality (CICWQ), we would like to acknowledge the time, effort and expertise that went into developing the proposed Municipal Storm Water Permit (Permit) and thank the San Diego Regional Water Quality Control Board for this opportunity to express our concerns with the Permit.

CICWQ is comprised of the four major construction and building industry trade associations in Southern California. These include the Associated General Contractors of California (AGC), the Building Industry Association of Southern California (BIA/SC), the Engineering Contractors Association (ECA) and the Southern California Contractors Association (SCCA). These organizations work collectively to provide the necessary infrastructure and support for the region's business and residential needs.

The membership of CICWQ is comprised of construction contractors, labor unions, landowners, developers, and homebuilders throughout the region and state. All segments of the coalition are impacted by the proposed Permit, including construction employees who rely on jobs in the region, landowners within the Board's jurisdictional boundaries and potential builders who require land resources to satisfy the ever-growing demand for housing.

This Permit will most likely yield a number of unintended consequences that could further exacerbate our housing crisis. These regulations will likely result in fewer, but more expensive residential projects being completed in the future, due to additional costs and restrictions involved in complying with these regulations. This will, in turn, compromise job growth, housing production and the ability of residents to own their own home. These factors can have a significant negative effect on the regional economy.

CICWQ is very supportive of the Board's efforts to develop new ways for improving our quality of life through improved water quality. However, the building and construction industries want to ensure that these efforts are practical, achievable and will result in actual improved water quality.

Provision A.1 of Tentative Order R9-2004-001 states:

> "Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC Section 13050), in waters of the state are prohibited."

The following procedure describes an approach to address non-jurisdictional discharges into the MS4s owned and operated by the Permittees:

3.4.1 Procedure to address discharges to Permittee MS4s from sources outside the authority of the Permittees.

The Permittees lack legal jurisdiction over discharges into their respective MS4s from agricultural activities, California and federal facilities, utilities and special districts, Native American tribal lands, and other point and non-point source discharges otherwise permitted or approved by the Regional Board.

If the Permittees Illicit Connection/Illegal Discharge (IC/ID) Detection and Elimination Program or Receiving Waters Monitoring Program identifies non-jurisdictional discharge causing, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State, the following minimum guidelines will be followed:

1) The Permittees will document the non-jurisdictional discharge.
2) When appropriate, collect samples of the non-jurisdictional discharge.
3) In emergency situations, the Permittees will utilize the Hazardous Materials Emergency Response Team and coordinate with the Office of Emergency Services and the San Diego Regional Board to control the impact of the non-jurisdictional discharge on MS4s and receiving waters.
4) The Permittees will notify the discharger verbally, at minimum, of their illegal discharge and the impact on receiving waters and provide appropriate educational materials.
5) If necessary, the Permittees will contact the appropriate enforcement agency and/or the San Diego Regional Water Quality Control Board to notify them of the non-jurisdictional discharge causing, or threatening to cause, a condition of pollution, contamination or nuisance, in waters of the State.
6) Permittees will notify the responsible entity of the availability of technical assistance and provide guidance in seeking grants and other assistance to address the non-jurisdictional discharge.

The Permittees will, as appropriate, participate in watershed management efforts with other Federal, State, regional, local agencies and other watershed stakeholders to address stormwater quality issues within the watershed.

Based on the foregoing, we ask that you consider the following comments pertaining to the Permit and that you work with CICWQ to find solutions that will protect jobs, housing and good water quality for the residents in our region.

Findings Discussion

1. **Finding 4** states the following:

   Urban runoff contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of the waters of the State. The discharge of urban runoff from an MS4 is a "discharge of pollutants from a point source" into waters of the United States as defined in the Clean Water Act.

   Comment: The Regional Board proposes to classify all storm water and all dry weather flow as containing "waste" *per se*. That is, all storm water, whether it reaches the storm drain by flowing over undeveloped open space or over a parking lot, whether or not it intercepts waste materials on its way to the storm drain, frankly, whether it contains any pollutants or is clean, is all considered to contain "waste" by the Regional Board. The same is true for dry weather flow, regardless of its source or concentration. This gross extension of the term "waste" turns rainfall into wastewater without any specific consideration of the actual contents of the runoff produced. This overbroad construction of the law is invalid.

   Where industrial or municipal activity resulted in the introduction of "waste" into storm water, that specific storm water could be subject to discharge requirements. See, e.g., Aluminum Co. of Am., SWRCB Order No. WQ 93-9 (1993) (discharge of acid-contaminated water from a mine was "waste"); Lake Madrone Water Dist. v. State Water Res. Control Bd., 209 Cal. App. 3d 163, 166 (1989) (discharges from reservoir operated in a way to concentrate sediment before release into a creek was "waste" where discharge choked pools in creek and clogged "spawning areas so heavily as to destroy fish and aquatic life."). These cases are distinguishable from the broad sweep of the Regional Board's finding which proposes to classify every drop of rain water in the Santa Margarita Watershed reaching a public storm drain as containing "waste."

2. **Finding 10** states the following:

   Peak storm water discharge rates, velocities and durations must be controlled to prevent downstream erosion and protect stream habitat. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost.

   Therefore, runoff leaving a developed urban area is significantly greater in volume, velocity, peak flow rate, and pollutant load than pre-development runoff from the same area. The

PROCEDURE TO ADDRESS NON-JURISDICTIONAL DISCHARGES.

Summary

Tentative Order R9-2004-001 finds that urban runoff can carry pollutants that can cause, or threatens to cause, a condition of pollution or nuisance (as defined in CWC Section 13050) in receiving waters. The Tentative Order further finds that Permittees cannot "passively" accept pollutant-laden discharges from third party sources into their MS4s. The Tentative Order then prohibits discharges into an MS4 that causes, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State.

Pollutant-laden discharges from third parties can come from many different sources, both within and outside of the authority of the Permittees to control. As the Tentative Order is currently written, a discharge source outside of the Permittees' authority that causes, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State, could place the Permittees in a position of unavoidable non-compliance with the requirements of Tentative Order R9-2004-001. This condition would also exist should the discharger refuse Permittee requests to voluntarily cease the discharge. Permittees will comply with the requirements of the Tentative Order relative to the subject of non-jurisdictional discharges as referenced in the procedure outlined below, subject to the authority and limitations imposed by federal and state law (including, but not limited to, the United States and California constitutions, Title 33 U.S.C. Sections 1251 et seq., California Water Code Sections 13000 et seq., statutory and decisional law relating to drainage, water rights and water quality).

Regional Board staff have suggested that the Permittees develop a proposed amendment to the existing DAMP whereby a procedure is established to address non-jurisdictional discharges that causes, or threatens to cause, a condition of pollution, contamination or nuisance in waters of the State. This procedure would be credited in the Findings of the Tentative Order as meeting MEP with regard to discharges from third party sources outside the jurisdiction of the Permittees. The procedure would ensure that the Permittees are taking an active role in promoting water quality management throughout the Santa Margarita Region, not just in areas under their jurisdiction.

A procedure to address non-jurisdictional discharges is hereby submitted as an amendment to the DAMP.

Regulatory Authority:

Finding 18 of Tentative Order R9-2004-001 states:

> "As operators of the MS4s, the Permittees cannot passively receive or discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These Discharges may cause or contribute to a condition of contamination or exceedances of receiving water quality objectives."

increased volume, velocity, rate, and duration of runoff greatly accelerate the erosion of downstream natural channels.

Comment: While it is true that urbanization affects hydrology, such effects on the flow regime occur regardless of what pollutants are present in stormwater or, indeed, regardless of whether or not any pollutants are added to stormwater as it traverses the land. While such effects may constitute "pollution" as that term is defined in the Clean Water Act, they do not constitute the "discharge of pollutants," as that phrase is defined in the Clean Water Act. "EPA does not consider flow to be a pollutant."[1] The public storm drain program is limited to controls on pollutant discharges. Other Clean Water Act programs not administered by the Regional Board are designed to address general pollution problems, such as might result from bank erosion and widening of channels. Water per se, regardless of what constituents are in it, is not a "pollutant" regulated under the NPDES program, within the statutory definition. Thus, the regulation of stormwater flows in this Permit is void under the Clean Water Act to the extent it is regulating flow velocities, flow volumes and flow durations.

3. **Finding 14** states the following:

Developing minimum BMPs and implementing or requiring their implementation at industrial and commercial facilities, construction sites, and residential areas is necessary for the Permittees to ensure that, ultimately, discharges of pollutants into and from its MS4 are reduced to the MEP.

Comment: Neither federal nor state law provides the Regional Board with the authority to regulate discharges into the MS4. Clean Water Act Section 402(p)(3)(B)(iii) is limited to "discharges from municipal storm sewers" (emphasis added). The statute does not authorize the regulation of discharges into MS4s. Congress likely refrained from regulating discharges into MS4s because any such regulation would impinge upon the authority of local officials to regulate land use and development.[2]

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[1] Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43586,43619 (July 13, 2000). Case law interpreting the Clean Water Act uniformly has found the definition of "pollutant" to not include downstream erosion. See e.g., National Wildlife Fed'n. v. Gorsuch, 693 F.2d 156, 171-172 (D.C. Cir. 1982) (holding that discharges from dams were not discharges of pollutants, but rather were discharges that altered water quality conditions – namely scouring the downstream channel – and as such, did not fall under the definition of "pollutant" and did not require an NPDES permit); Missouri, ex rel. Ashcroft v. Department of the Army, 672 F.2d 1297, 1303 (8th Cir. 1982) (finding that fluctuations in flow rates of water that created downstream erosion did not result in the "discharge of a pollutant" under the CWA and the relevant permit was void to the extent it regulated downstream erosion).

[2] And thus, would appear to disregard the Congressional intent stated in CWA § 101(b) which reserves primary land use authority to the States, as opposed to the federal government or an agency operating under federal authority.

Water Quality Parameter	Irreducible Concentration
TSS	20 – 40 mg/L
Total Phosphorus	0.15 – 0.2 mg/L
Total Nitrogen	1.9 mg/L
Nitrate as Nitrogen	0.7 mg/L
Total Kjeldahl Nitrogen	1.2 mg/L

The irreducible concentrations for Total Nitrogen and Total Phosphorus are almost twice their respective BPOs, indicating that the BPOs may be unachievable with current BMP technology.

No Future Problems with Runoff from Urban Development Are Expected

Given the effectiveness of the existing program and other local, state and federal source control programs implemented in the Santa Margarita Region, no future water quality impairments associated with runoff from urban development are expected in the Santa Margarita Region. No future problems associated with runoff from urban development are expected as the SUSMP requirements specified in the Tentative Order require implementation of project specific controls. Further, with the increased control of pollutant sources that have resulted from increased regulation of hazardous materials, controls on the use of pesticides and the existing inspection and control programs implemented by the Permittees, no impairments of beneficial uses due to runoff from urban development in the Santa Margarita Region are expected in the future.

4. **Finding 15** states the following:

Controlling urban runoff pollution by using a combination of onsite source control BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. Whereas, onsite source control BMPs can be applied during all runoff conditions; (2) End-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.

Comment: This finding is without merit. There are several types of end-of-pipe BMPs that are capable of capturing and treating a wide range of pollutants that are generated on a sub-watershed scale. Also, end-of-pipe BMPs may be able to be located in locations that are much more effective than source control BMPs and on-site treatment control BMPs at protecting the quality and beneficial uses of Waters of the U.S. In addition, there may be many cases where there are no beneficial uses to protect between the source and the Waters of the U.S.

5. **Finding 16** states the following:

Urban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an urban runoff treatment facility within a water body, or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. This is consistent with EPA guidance to avoid locating structural controls in natural wetlands.

Comment: The term "receiving water" used in the first sentence of this finding should be revised to read "waters of the U.S." Also, it should be made clear that urban runoff treatment and/or mitigation should not prevent the attainment of the beneficial uses listed for that water body. If a regional/watershed solution can be constructed in such a location and in such a way that the beneficial uses of the water body are maintained, than there is no reason that the solution should be disallowed. This is consistent with the federal regulations at 40 CFR 131.10(a) that is referenced to support this finding. Also, the term "water body" used

Management of peak flow and volume from new developments is effectively addressed by existing Permittee requirements. In general, the Permittees require peak flow and volume to be managed to pre-development conditions unless the receiving drainage has been improved to accept the increased peak discharge and volume. The requirements to control peak discharges and volume in the Tentative Order should be similarly revised so as not to negatively impact housing costs without providing an environmental benefit.

The current and projected storm flows in the Santa Margarita River are less than under natural conditions due to the construction and operation of Diamond Valley Reservoir, Lake Skinner and Vail Lake.[3] Over 50% of the Santa Margarita River watershed has been controlled by the construction of Vail Dam in 1949 and Skinner Reservoir in 1974, which created significant storage capacity in the upper watershed.[4] Due to this storage capacity, peak flow rates during major flow events for both existing and future land use conditions will be lower than under natural conditions (assuming average storage conditions in the reservoirs).[5] Further, the areas of the Santa Margarita Region that receive the most precipitation are controlled by Skinner and Vail Lakes.

Water quality problems associated with urban development in other areas that are cited in the Fact Sheet are not problematic here. This illustrates the unique watershed characteristics in the Santa Margarita Watershed and the effectiveness of the existing compliance programs implemented by the Permittees.

The New and Expanded Compliance Requirements Will Not Address the Phosphorous "Impairment"

As noted previously, the 2002 CWA Section 303(d) List of Water Quality Limited Segments lists Murrieta Creek and the Upper Santa Margarita River as impaired for phosphorus, with a low TMDL priority. Considering past and current agricultural use in the Santa Margarita Region, the presence of elevated levels of phosphorus is not unexpected.

The 303(d) listing for phosphorus is based on the Basin Plan Objective of 0.1 mg/L for total phosphorus. Some BPOs, especially for nutrients, may be unachievable using conventional stormwater BAT/BCT. The Center for Watershed Protection[6] presents a table of "irreducible concentrations" of selected contaminants, the lowest concentration that can possibly be achieved using existing BMPs. The table, reprinted below, is:

[3] California Department of Finance, 2003.
[4] Philip Williams & Associates, Santa Margarita Watershed Study: Hydrology and Watershed Processes, October 26, 1998, p. 14.
[5] Philip Williams & Associates, Santa Margarita Watershed Study: Hydrology and Watershed Processes, October 26, 1998, p. 20.
[6] *Irreducible Pollutant Concentrations Discharged From Stormwater Practices*, article 65, The Practice of Watershed Protection, editors Thomas R. Schueler and Heather K. Holland, published 2000 by the Center for Watershed Protection, Ellicott City, MD.

throughout this finding should also be changed to "waters of the U.S." Without changing the wording in these instances, this finding has no legal foundation, especially in reference to 40 CFR 131.10(a) as stated.

6. **Finding 17** states the following:

Historic and current developments make use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are both MS4s and receiving waters.

Comment: This finding completely lacks any foundation. First of all, MS4s are well defined within each municipal jurisdiction, and may or may not include natural drainage patterns and features. Second of all, receiving waters are considered to be surface waters as defined by the Basin Plan. Therefore, these natural drainage patterns would only be considered a receiving water if they were included as a surface water in the Basin Plan with listed beneficial uses.

7. **Finding 18** states the following:

As operators of the MS4s, the Permittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or exceedances of receiving water quality objectives.

Comment: The regional board is without authority to regulate third parties' private property under the municipal permit. At issue herein is a municipal permit regulated under the NPDES provisions of the Clean Water Act. (See 33 U.S.C. § 1342(p)(3)(B).) The subject of the regulation is the MS4 *itself* and discharges there from. The permittee/Permittee (i.e., regulated entity) is the operator of the MS4. Notwithstanding this relatively straightforward regulatory concept, the proposed Permit far exceeds the bounds of permissible regulation thereunder. Specifically, under the guise of this municipal NPDES permit, the Regional Board asserts jurisdiction over third parties' private property. The proposed Permit seeks to regulate the *anticipated* sources of *potential* discharges, before they ever even actually discharge into the MS4, and certainly well before such substances are actually discharged from the MS4. This exceeds the Regional Board's authority under the operative provisions of the Clean Water Act.

This fact is highlighted by the Clean Water Act's wholly independent provision for regulation of actual construction sites. (See 33 U.S.C. §§1311, 1342(p)(3)(A).) Those separate provisions of the Clean Water Act provide specific and limited constraints for actual site regulation involving construction activities. But for whatever reason, this Regional Board

RUNOFF FROM URBAN DEVELOPMENT IS NOT A SIGNIFICANT SOURCE OF IMPAIRMENT

Urban Development is a Minor Land Use in the Santa Margarita Region

Although portions of the Santa Margarita Region are experiencing rapid growth, 94 percent of the watershed is comprised of non-urban (rural residential, agriculture, state lands, federal lands, and tribal lands) land uses.[1] It is projected that the population of Riverside County will increase approximately 20 percent by 2010.[2] Assuming that the urbanized area increases proportional to population, 93 percent of the watershed would remain in non-urban land uses in 2010. As a result, runoff from urban development is only a minor component of the storm flow received by the Santa Margarita River.

Non-Storm Runoff From Urban Development is Not a Water Quality Problem

Runoff from urban development is not a contributor to water quality and quantity in the Santa Margarita River during non-storm conditions. With the exception of rising groundwater and water in the lowest reaches of Murrieta and Temecula Creeks and deliveries of imported water from the Rancho California Water District, there is no perennial flow to the Santa Margarita River from urban development in the Santa Margarita Region. During the majority of the year and throughout the non-storm period, the entire system is essentially dry with the following minor exceptions:

- Flows resulting from springs in Redhawk and Warm Springs Creeks each of which infiltrate within a few feet of entering Temecula and Murrieta Creeks, respectively.
- Intermittent, low-volume discharges of non-storm runoff from urban development. These flows infiltrate rapidly, so there is no contiguous flow to the Santa Margarita River. However, even if contiguous flow did occur, these flows would not result in significant pollutant loading to the Santa Margarita River.
- The most significant non-storm discharges in the watershed consists of raw water supply well blow off which is allowed by the Regional Board.

Water Quality Problems Related to Runoff From Urban Development are Minor and Effectively Controlled

The single water quality impairment in the Santa Margarita Region identified by the Regional Board in the 2002 California 303(d) List and TMDL Priority Schedule is for phosphorous. However, the Basin Plan objective for phosphorous is set so low that even background conditions unaffected by urban or agricultural development exceed this limit. Given that there is no non-storm runoff from urban development to the Santa Margarita River, there is no loading of phosphorous contributing to downstream impairments during these conditions.

Although the Permittees have identified several pollutants of concern, they are effectively managed by the existing management programs and, with the possible exception of phosphorous, do not contribute to impairments.

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[1] County of Riverside Assessor, 2002.
[2] Southern California Association of Governments, May 2003.

has not or cannot effect such regulations over areas generally regulated via California's General Construction Permit. This fact, however, does not justify the hybridization of distinct regulatory measures. Again, at issue here is the MS4 and its operator, not private, third party landowners. The regulation proposed in the subject permit is nothing short of attempted usurpation of local land use authority by this state entity.

Additionally, the Regional Board fails to demonstrate the constitutional justification for the exercise of federal jurisdiction over these wholly intrastate facilities, in advance of any discharge to waters of the United States (e.g., Commerce Clause).

For all of these reasons, the Regional Board is without jurisdiction under the subject permit to exert regulatory authority and mandates over third parties' private property, as provided in the proposed permit.

8. **Finding 29** states the following:

CEQA: The issuance of waste discharge requirements and an NPDES permit for the discharge of urban runoff from MS4s to waters of the United States is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, § 21000 et seq.) in accordance with the CWC § 13389.

Comment: The Regional Board correctly cites the provision of the California Water Code exempting waste discharge requirements from Chapter 3 of the California Environmental Quality Act ("CEQA"); however, CEQA does apply to Regional Board permits to the extent that they contain provisions not required by the Clean Water Act.[3] The Clean Water Act does not require that municipal stormwater meet Water Quality Based Effluent Limits (WQBELs). Since the permit includes provisions not required by the Clean Water Act, the Regional Board cannot issue the permit without first conducting environmental review under CEQA. Where, as here, the action triggering CEQA compliance is a permit of countywide applicability with significant environmental implications, the Regional Board should prepare an Environmental Impact Report, including an alternatives analysis.

Prohibitions Discussion:

1. A. **Prohibitions** states the following

[3] See e.g., Committee for a Progressive Gilroy v. State Water Res. Control Bd., 192 Cal. App. 3d 847, 862 (limiting the CEQA exemption of § 13389 of the Cal. Water Code to those "actions required under" the Clean Water Act).

This is a combination of proactive and reactive monitoring. The goal of reconnaissance is to regularly observe the MS4 for evidence of illicit discharges. The search for illicit discharges will lead to discovery of illegal connections, if they exist. IC/ID monitoring will be conducted as part of responses to complaint calls and further investigation resulting from reconnaissance. This element will meet or exceed the requirements of the draft M&RP Dry Weather monitoring goals.

Dry Weather Monitoring

This suggested alternate monitoring program builds on the proposed draft M&RP and selects stations to evaluate long-term trends. The goal is to look for large-scale evidence of increasing flows which indicate additional inputs. Chemical monitoring will look for evidence of illicit discharges. The Reconnaissance and IC/ID monitoring entails frequent sampling which focuses on smaller-scale areas.

Watershed Monitoring

The upper SMR watershed is subdivided into two major drainage areas, for Temecula and Murrieta Creeks. Watershed monitoring utilizes the triad approach at "sentinel" stations at the bottom of each drainage area and at a reference station within the upper SMR watershed. Chemistry, toxicity, and bioassessment are monitored at these three stations. Improvements in the urban runoff management program should be evident in improvements in water and habitat quality, although the results could be confounded by the presence of rising groundwater. If no improvements are noted in the sentinel stations, this would confirm that urban runoff is not contributing to receiving water impairments.

1. *Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC § 13050), in waters of the state are prohibited.*
2. *Discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited.*
3. *Discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited.*
4. *In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in* ***Attachment A*** *to this Order.*

Comment: The permit, by regulating flow both into and out of the MS4, exceeds the jurisdiction of the NPDES program. Neither federal nor state law provides the Regional Board with the authority to regulate discharges into the MS4. Clean Water Act Section 402(p)(3)(B)(iii) is limited to "discharges from municipal storm sewers" (emphasis added). The statute does not authorize the regulation of discharges into MS4s. Congress likely refrained from regulating discharges into MS4s because any such regulation would impinge upon the authority of local officials to regulate land use and development.[4]

In addition, these requirements are not included in State Water Resources Control Board (State Board) Order No. WQ 99-05, which required specific receiving water limitation language to be included in future municipal stormwater permits. These two items, if left in the Permit, would most likely create a situation where all dischargers would be in non-compliance of this Order from day one of implementation. In fact, these provisions violate, SWRCB Order No. 99-05. It was the "shall not cause or contribute" language that Order 99-05 expressly struck and replaced. "It is hereby ordered that Order WQ 98-01 will be amended to remove the receiving water limitation language contained therein and to substitute the EPA language." (Order 99-05, p. 1, emphasis added.)

The "EPA language" referred to does not include the "cause or contribute" language that was present in Order 98-01. On the contrary, the EPA language outlines a series of practicable safeguards to reasonably accomplish Basin Plan objectives. Thus, this Permit's strict receiving water prohibitions do not comport with Order 99-05. Further, Order 99-05 expressly includes in its language that it is a "precedential decision," unlike the SUSMP Order. In defending continued inclusion of the "cause or contribute" receiving water limitation language from rejected Order 98-01, the administrative record appears to rely on a pattern of including identical receiving water limitation language in other permits. This defense of "well, we've always done it that way" does not in any way validate an inappropriate practice. At every turn, the point is made that the receiving water limitation

[4] And thus, would appear to disregard the Congressional intent stated in CWA § 101(b) which reserves primary land use authority to the States, as opposed to the federal government or an agency operating under federal authority.

upstream of the confluence of Murrieta and Temecula Creeks and imported water which is delivered shortly below the confluence.

Runoff from urban development in the Santa Margarita Region is only a minor component of the total runoff during storm conditions.
Runoff from urban development is only a minor component of the total runoff during storm conditions and this runoff rapidly infiltrates and does not contribute to downstream pollutant loading. Therefore, monitoring of flows during non-storm conditions in the lower reaches of Murrieta and Temecula Creeks and the Santa Margarita River will not reflect contributions of runoff from urban development.

In an ephemeral watershed, the first storm of the year that falls under the USEPA-recommended criteria may not result in runoff from surrounding properties. The District has developed guidance on when wet-weather samples should be collected.

The Requirement To Do "Compensatory Monitoring" Does Not Make Sense In An Ephemeral System

As previously mentioned, the Santa Margarita Region receives approximately 12 inches of rain annually in the urbanized portions of the watershed. In the 2003-2004 reporting period, the watershed has received less than 2 inches of rain over the course of several small storms. This is indicative of the current drought cycle that has impacted Southern California for several years. Generating enough stormwater runoff to initiate water quality sampling requires a fairly significant storm of several hours duration. Further, the storm must be forecast early enough that the water quality sampling teams can mobilize, the labs can be notified, etc. The District has established a clear procedure under which conditions are correct for mobilization:

It is not uncommon for weather forecasters to under-predict or over-predict rainfall. Rainfall events can also fall during holiday periods, such as the Christmas Day storms last year, and can have an impact on the Permittee's ability to mobilize the significant numbers of staff required to sample storm events. For these reasons, it is common that three wet weather samples not be collected during a particular season. This is not due to negligence on the part of the Permittees, but on the variability in the accuracy of weather forecasts, the often-insignificant amount of rainfall that does occur and the length of the storms. Not only is it unclear why the Regional Board believes it is necessary to assign "compensatory monitoring" where the collection of samples is beyond the reasonable control of the Permittees, it is unclear what purpose this monitoring would serve.

Recommended Alternative Monitoring Program

The Recommended alternative monitoring program utilizes the concepts and goals stated in the draft M&RP and tailors them to maximize effectiveness in an ephemeral watershed.

Reconnaissance and IC/ID Monitoring
In an ephemeral watershed, reconnaissance and IC/ID monitoring is the most important element of the monitoring program. The MS4 permits require that the Permittees effectively prohibit the discharge of non-storm water into their respective MS4s and to Waters of the U.S. During dry weather, regular surveys of their MS4s need to be conducted by each Permittee. If water is observed, its source must be located and eliminated if not an allowed discharge.

language is consistent with Order 99-05. From the plain face of Order 99-05, this is clearly not the case. The Permit's later inclusion of the language contained in Order 99-05 does not rectify this error. Order 99-05 states outright that the "cause or contribute" language of 98-01 is removed and replaced with the language of Order 99-05. The provisions are mutually exclusive, and Order 99-05 resolved which controls.

Developing Planning

1. **Section F.1 Assess General Plan** states the following:

Each Permittee's General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) shall include water quality and watershed protection principles and policies to direct land-use decisions and require implementation of consistent water quality protection measures for development projects. As part of its Individual SWMP, each Permittee shall provide a workplan with a time schedule detailing any changes to its General Plan regarding water quality and watershed protection. Examples of water quality and watershed protection principles and policies to be considered include the following:

(1) *Minimize the amount of impervious surfaces and directly connected impervious surfaces in areas of new development and redevelopment and where feasible slow runoff and maximize on-site infiltration of runoff.*

(2) *Implement pollution prevention methods supplemented by pollutant source control and treatment control BMPs. Use small collection strategies located at, or as close as possible to, the source (i.e., the point where water initially meets the ground) to minimize the transport of urban runoff and pollutants offsite and into an MS4.*

(3) *Preserve, and where possible, create or restore areas that provide important water quality benefits, such as riparian corridors, wetlands, and buffer zones. Encourage land acquisition of such areas.*

(4) *Limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways, and bridges.*

(5) *Prior to making land use decisions, utilize methods available to estimate increases in pollutant loads and flows resulting from projected future development. Require incorporation of structural and non-structural BMPs to mitigate the projected increases in pollutant loads and flows.*

(6) *Avoid development of areas that are particularly susceptible to erosion and sediment loss; or establish development guidance that identifies these areas and protects them from erosion and sediment loss.*

burden placed on the Santa Margarita Region Permittees is excessive. The anticipated monitoring budget exceeds the entire Santa Margarita Benefit Assessment revenue past actual and future estimated totals, which has, to this time, been adequate to fund staffing, monitoring, compliance, inspections and administration of the Principal Permittee's runoff management program.

The per capita costs also do not take into consideration a comparison of *ad valorem* property values between Riverside County and those of Orange and San Diego Counties. Property taxes, which provide for the General Fund that provides the operating and service budgets of local governments, are based on *ad valorem* property values. The property values of homes in the Santa Margarita region are much lower than those of the other two counties, especially in the coastal communities. This greatly reduces the amount of additional funding that may be obtained through the General Fund. Proposition 13, passed by the voters in 1978, limits property taxes to 1% of the property value when the home was purchased, and further limits increases in the assessed property value to not more than 2% per year. The authority for allocating property tax revenues was also transferred in Proposition 13 from local government to the state.

The Data Generated Will Have Limited Utility For Management Of Runoff From Urban Development

The current monitoring program produced water quality data, which was summarized in Annual Reports. Comments on the monitoring program were not received from the Regional Board and the emphasis was on program development and implementation. Further, the Permittees were challenged by the requirement to submit three separate annual reports each year. Consequently, the monitoring program continued as presented in the CMP, with modifications made as appropriate, including the addition of a reference station in 2001.

In the draft M&RP, a detailed monitoring program is prescribed. This M&RP will also result in the collection of multitudes of data at substantial cost (see the cost analysis in the previous section). However, the appropriateness of this program to the Santa Margarita Region and the usefulness of the data in providing data of use in managing urban runoff quality is questionable.

Elements Of The Proposed Monitoring Program Are Not Appropriate For The Santa Margarita Region

Murrieta and Temecula Creeks are ephemeral.
The climate in the upper Santa Margarita watershed is characterized as semi-arid with an average annual precipitation of approximately 12 inches in the urbanized areas. Murrieta and Temecula Creeks are perennial interrupted streams, i.e., they include reaches in which the flow is continuous and others where flow is ephemeral. The areas of perennial flow are located in mountain area tributaries and immediately downstream of springs in Warm Springs and Redhawk. The perennial flows infiltrate within a short distance of entering Murrieta or Temecula Creeks. Where runoff from urban development occurs, it is of low volume and intermittent, rapidly infiltrates and does not contribute to downstream pollutant loading. The creeks in the urbanized areas of the watershed, located primarily in the valley, are ephemeral and flows are observed only during and immediately after significant storm events. Flow occurs in each of these creeks a short distance upstream of the Santa Margarita River because of rising groundwater. This flow is augmented by imported water deliveries by the Rancho California Water District downstream of the confluence of these creeks. Therefore, monitoring of flows during non-storm conditions in the lower reaches of Murrieta and Temecula Creeks and the Santa Margarita River will not reflect contributions of runoff from urban development as the flow consists of rising groundwater approximately one-quarter to one-half mile

(7) *Reduce pollutants associated with vehicles and increasing traffic resulting from development.*

(8) *Post-development runoff from a site shall not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives or which have not been reduced to the maximum extent practicable.*

Comment: It does not make sense to use small collection strategies located at, or as close as possible to, the source for areas where economies of scale make it much more technically, economically and environmentally beneficial to use regional/watershed multi-use solutions (such as parks and ball fields), located prior to discharging into a Water of the U.S., that would be better designed and maintained.

The use of the words minimize, maximize and reduce are overly broad and subject to wide discretion and problematic enforcement. We suggest inserting the wording "to the extent technically and economically feasible" after each of these words. In addition, the requirement to minimize the amount of impermeable surfaces may have the unintended consequence of creating urban sprawl and decreasing the amount of housing that will become available in the future. To create less impermeable surfaces will potentially lead developers to build with lower densities in outlying areas, thus flying in the face of high density "smart growth" development that attempts to address the housing supply issue with minimal impact to open space.

Item 7 attempts to regulate traffic resulting from development. This is another example of the regional board's attempt to supercede local land use control. Traffic considerations, as well as water quality and environmental concerns are already addressed through the CEQA process and are unnecessary, and in fact illegal, in this Permit.

Item 8 is an example of a water quality based effluent limit (WQBEL) requirement and is without legal standing and merit (see General Issues section for detailed analysis).

2. **Section F.2. Modify Development Project Approval Processess** states the following:

Each Permittee shall include development project requirements in local permits to ensure that pollutant discharges and runoff flows from development are reduced to the maximum extent practicable and that receiving water quality objectives are not violated throughout the life of the project. Such conditions shall, at a minimum:

(a) *Require project proponent to implement applicable pollution prevention and source control BMPs for applicable development projects.*

SMR Monitoring Program Cost summary		
Program Costs		
	Base cost	Incl. OT
SDRB estimate of proposed Core Monitoring costs	*$122,068*	
(Doesn't incl. TIE, TRE, Dry Weather)		
RCFC estimate of proposed Core Monitoring costs	$163,143	
RCFC estimate of proposed Dry Weather costs	$16,523	
Total monitoring costs	**$179,666**	
RCFC estimate of Core Monitoring labor costs	$77,452	$110,448
RCFC estimate of Dry Weather labor costs	$34,826	$52,239
Physical costs (rating cks, report prep, vehicles, consultant	$136,000	$136,000
Total labor costs	**$248,278**	**$298,687**
Total monitoring & labor costs	**$427,944**	**$478,353**
Special study costs not estimated		
Per Capita Costs		
Riverside County population estimate	168,450	
RCFC estimate of per capita Core Monitoring lab costs	$0.97	
RCFC estimate of per capita Dry Weather lab costs	$0.10	
RCFC estimate of per capita labor (Core & Dry) costs	$1.47	$1.77
Total RCFC estimate per capita costs	**$2.54**	**$2.84**
SDRB estimate of fair per capita cost for Riverside Co.	*$0.57*	
SDRB per capita cost estimate for San Diego Co.	*$0.36*	
SDRB per capita cost estimate for Orange Co.	*$0.79*	
SDRB per capita Core Monitoring cost estimate for Riverside Co.	*$0.72*	

In looking at the table, it is clear that the projected monitoring program per capita costs are much higher than those presented for San Diego and Orange counties. To put these costs in context, note that

- The Core Monitoring analytical costs alone are higher than those for the other counties,
- The entire population of Riverside **County** within the Santa Margarita Region (168,450) is less than that of the **City** of San Diego (1,275,000),
- Runoff from urban development in the Santa Margarita Region is intermittent and minor when it occurs and
- Runoff from urban development has no contiguous flow to the Santa Margarita River and would result in inconsequential pollutant loading to the Santa Margarita River if it did.

In contrast, many discharges of runoff from urban development within San Diego and Orange Counties are continuous, have continuity to downstream receiving water flows and discharge to and impair beaches regularly used for water contact recreation. Based on this comparison, the monitoring

(b) *Require project proponent to implement site design/landscape characteristics where feasible which maximize infiltration, provide retention, slow runoff, and minimize impervious land coverage for all development projects.*
(c) *Require project proponent to implement buffer zones for natural water bodies, where feasible. Where buffer zone implementation is infeasible, require project proponent to implement other buffers such as trees, lighting restrictions, access restrictions, etc.*
(d) *When known, require industrial facility operators subject to the General Industrial Permit, to provide evidence of permit coverage prior to occupancy.*
(e) *Require project proponent to ensure its grading or other construction activities meet the provisions specified in Section G of this Order.*
(f) *Require project proponent to provide proof of a mechanism which will ensure ongoing long-term maintenance of all structural post-construction BMPs.*

Comment: We are very supportive of the establishment of fair, consistent and enforceable water quality regulations that also consider the need to develop housing, however several of these requirements are open to very inconsistent interpretation, implementation and enforcement. This inconsistency is caused by the use of such words as implement, maximize, minimize, slow and ensure without guidance as to what constitutes compliance. For example, how would a project proponent ensure long-term maintenance of BMPs. They can only ensure maintenance up until the time that the property is sold. After that, they no longer have jurisdiction over the property or the BMPs. It is not the role of the original property owner to be responsible for the actions of all future property owners. This would be the same as requiring an automobile dealership to be responsible for the ongoing maintenance of all the vehicles that it sells.

3. **Section F.2.b Standard Urban Storm Water Mitigation Plans (SUSMPs)** states the following:

Within 365 days of adoption of this Order, each Permittee shall develop, adopt and implement a Standard Urban Storm Water Mitigation Plan (SUSMP) to reduce pollutants to the MEP and to maintain or reduce downstream erosion and protect stream habitat from all Priority Development Projects. Priority Development Projects are: a) all new development projects, and those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site, that are listed under the project categories or locations in Requirement F.2.b.(1) below. Redevelopment includes, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land disturbing activities related with structural or impervious surfaces. Where significant redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject

NEED FOR REVISION TO THE MONITORING PROGRAM

The Proposed Monitoring Program Is Not Coordinated With Other Regions

The County, District and cities (Permittees) have been issued NPDES municipal separate storm sewer system (MS4) permits (Permits) by the Santa Ana[1], San Diego[2] and Colorado Region[3] RWQCBs. In the 1990's, the District worked with each of the RWQCBs to develop a "Consolidated Monitoring Program" (CMP) to cost-effectively coordinate compliance with the monitoring requirements of the MS4 permits. The CMP included monitoring at selected stations throughout each of the Regions. The RWQCBs directed the Riverside County Permittees to implement the CMP in the "second round" MS4 permits. In addition, USEPA Region IX directed the implementation of the CMP in reissuing the MS4 permit for the Santa Margarita Region. However, the proposed Monitoring and Reporting Program (MRP) has disregarded the CMP and now specifies unique core monitoring, special studies and dry weather monitoring programs without coordination with the other Regions. The resulting increases in monitoring costs have been significant. This has occurred even in the face of the funding crises faced by the state and local government.

The Cost Of The Proposed Monitoring Program For The Santa Margarita Region Will Be Burdensome

The Fact Sheet presents estimated annual and per capita costs for the proposed monitoring program. Some of the program component costs come from external sources, such as the Center for Watershed Protection, SCCWRP, and San Diego and Orange Counties. The monitoring costs presented in the Fact Sheet consider only analytical costs.

The Permittees' estimated program costs are based on costs from their contract laboratory and staff time. Both analytical and labor costs were considered. The table on the next page summarizes the calculations.

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[1] Order No. R8-2002-0011. NPDES No. CAS 618033, Waste Discharge Requirements for the Riverside County Flood Control and Water Conservation District, the County of Riverside and the Incorporated Cities of Riverside County within the Santa Ana Region Areawide Urban Runoff.

[2] Tentative Order No. R9-2004-001. NPDES No. CAS0108766. Waste Discharge Requirements for the Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) draining the County of Riverside, the City of Murrieta, the City of Temecula and the Riverside County Flood Control and Water Conservation District within the Santa Margarita Watershed.

[3] Order No. 01-077. NPDES No. CAS617002. National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Riverside County Flood Control District, Owner/Operator; County of Riverside, Owner/Operator and Incorporated Cities of Riverside County within the Whitewater River Basin, Owner/Operators for the Discharge of Whitewater River Watershed Storm Water.

to SUSMP requirements, the numeric sizing criteria discussed in section F.2.b.(3) applies only to the addition, and not to the entire development. Each Permittee shall submit both the adopted SUSMP and amended ordinances to the SDRWQCB no later than 365 days after the adoption of the Order.

Immediately following adoption of its SUSMP, each Permittee shall ensure that all new Priortiy Development meet SUSMP requirements. The SUSMP requirements shall apply to all priority projects or phases of priority projects that have not yet begun grading or construction activities. If a Permittee determines that lawful prior approval of a project exists, whereby application of SUSMP requirements to the project is infeasible, SUSMP requirements need not apply to the project.

Comment: We find it inappropriate that the other Permittees under the jurisdiction of the San Diego Regional Water Quality Board faced with the implementation of similar, if not identical requirements were given a year and a half in which to implement the SWMP requirements. We see no reason why the Permittees and the development community within the Santa Margarita Watershed not be given the same year and a half in which to implement the SWMP requirements. These requirements will be a drastic departure from the current set of rules.

In addition, we feel that it is very important that all Permittees and project applicants understand and are consistent with language that addresses projects that have already received prior approvals. Therefore, we recommend the following language, "where new development is defined as projects for which tentative tract or parcel map approval was not received by October 1, 2005 and new re-development is defined as projects for which all necessary permits were not issued by October 1, 2005. However, projects that have not commenced grading by the initial expiration date of the tentative tract or parcel map approval shall be deemed a new development project as defined in this section. New development does not include projects receiving map approvals after October 1, 2005 that are proceeding under a common scheme of development that was the subject of a tentative tract or parcel map approval that occurred prior to October 1, 2005.

We also do not support the total reliance of this Permit on SUSMP provisions. Instead we support creating a process that promotes regional mitigation facilities to protect water quality from both new-development and existing development.

The SWRCB, in response to a petition regarding the Standard Urban Storm Water Mitigation Plans (SUSMPs) portion of the Los Angeles MS4 Permit, issued Order No. WQ 2000-11. In this Order the SWRCB states, "As a long-term strategy, municipal storm water dischargers should work to establish regional mitigation facilities, which may be more cost-effective and more technically effective than mitigation structures at individual developments."

recommendations of the California Stormwater Quality Association (CASQA) Municipal Handbook and New Development Handbook, or equivalent, for these activities. It should be noted that several of the aforementioned BMPs target activities that specifically introduce nutrients, including phosphorous, into the MS4s. This is based on descriptions of the pollutant removal effectiveness of these BMPs in the CASQA handbooks. The Permittees therefore find these as adequate to address facilities that discharge into CWA Section 303(d) impaired water bodies impaired by nutrients, including Phosphorous (Murrieta Creek and Santa Margarita River are impaired for Phosphorous).

The Intent of the Minimum Residential Area BMP Requirement Must Be Clarified

Regional Board staff has stated that the objective of Requirement H.3.c is to establish initial controls on the high priority residential activities listed in Requirement H.3.b. Regional Board staff indicated that controls for these activities are to be based on existing Ordinances. The Permittees will propose BMPs for the listed high priority residential activities based on existing ordinances where appropriate. The Permittees understand that the minimum BMPs for residential areas may include:

- Automobile Repair and Maintenance – Use 72-hour parking limit to control disabled and leaking cars parked in streets
- Automobile Washing – Prohibit discharge of engine degreaser residue into the MS4
- Automobile Parking – Enforce parking prohibitions on areas subject to street sweeping
- Home and Garden Care activities and product use – Prohibit the disposal of excess pesticides, herbicides, and fertilizer containers or products into the MS4
- Disposal of Household Hazardous Wastes – Provide HHW/ABOP Pick-up locations and events within the watershed, prohibit discharge of HHW into MS4.
- Disposal of Pet Waste – Prohibit discharge of Pet Waste to MS4
- Disposal of Green Waste – Prohibit discharge of Green Waste to MS4

With Regard to Requirement H.3.c.2, the Permittees find that the control of fertilizers, pet waste and green waste should adequately address activities that discharge into CWA section 303(d) impaired water bodies impaired by nutrients, including phosphorous (Murrieta Creek and Santa Margarita River are impaired for phosphorous).

The Permittees will comply with Requirement H.3.c.4 by developing and distributing public education materials to residents at community events, and the Permittees may also place radio or print advertisements in local media.

Instead of promoting regional mitigation facilities, this Permit contains SUSMP language that is not in line with the previous direction outlined in Order No. WQ 2000-11. Rather than imposing inappropriate SUSMP requirements, we urge the Board to allow the local communities the incentive to develop regional mitigation programs and the opportunity to shape the development of post-construction design standards on a local level so that meaningful programs will be implemented and will complement, rather than usurp, the existing land use regulatory processes. Where technically and economically justified, these programs will focus on regional mitigation facilities, in lieu of mitigation structures at individual developments. As outlined in the attached Brown and Caldwell's April 2003 study entitled, "Regional Solutions for Treating Stormwater in Los Angeles County: A Macrofeasibility Study", regional mitigation facilities have the following goals and benefits:

1. Water Quality Improvements
   a. Treat storm water from existing development as well as new development and redevelopment
   b. Regional, or watershed, facilities can be optimally located and sized to reduce pollutant loads from all tributary areas
   c. Regional, or watershed, facilities can address both dry-weather flows and wet-weather flows
   d. Regional, or watershed, facilities can enhance water quality to a greater degree by providing larger areas for more highly effective, land-intensive treatment methods, such as filtration technologies
   e. Regional, or watershed, facilities can be more easily upgraded to meet future water quality regulations
   f. Regional, or watershed facilities treat an entire sub-watershed and not just new development, or redevelopment, thus overall improvements in water quality can be realized more quickly
2. Cost-effectiveness
   a. Regional, or watershed facilities are inherently more cost-effective to construct and maintain
   b. Economies of scale enable greater pollutant reductions for the capital and ongoing operation and maintenance costs expended.
3. Long-term Maintenance
   a. Surveys of maintenance effective of on-site facilities on private land have shown that the majority were failing due to lack of maintenance
   b. Regional, or watershed facilities have a much higher likelihood of being maintained properly so they operate in perpetuity
4. Beneficial reuse of stormwater
   a. Urban runoff is increasingly being viewed as a potential resource, especially given the water supply challenges that California currently faces

The Permittees also request that Requirement H.2.c.1 be revised as follows:

> "Each Permittee shall designate a set of minimum BMPs requirements for ALL industrial/commercial facilities to reduce the discharge of pollutants in runoff to the MEP."

To

> "Each Permittee shall designate a set of minimum BMPs requirements for INVENTORIED industrial/commercial facilities to reduce the discharge of pollutants in runoff to the MEP."

The Intent of the Minimum Commercial and Industrial BMP Requirement Must Be Clarified

The Tentative Order requires the Permittees to establish and require Minimum Best Management Practices (BMPs) for Industrial and Commercial Activities (Requirement H.2.c.1). Page 53 of the Fact Sheet indicates that the Permittees listed several controls for industrial and commercial development as part of the ROWD. These controls include:

Industrial Sites:

- Require proper chemical material storage – areas kept clean, materials protected from rain/runoff, no leakage
- Ensure that dumpsters are properly maintained – lids closed, no signs of leaks, area clean
- Ensure that aboveground tanks are properly maintained – no signs of leakage to MS4, ensure proper maintenance of tanks
- Ensure onsite storm drain is protected from non-stormwater discharge
- Ensure water/oil separator is connected to sewer, ensure steam cleaning wash water is discharged to storm drain
- Ensure parking lot is free of trash and liquids other than water
- Mop water taken to sanitary sewer via clarifier
- Ensure coverage under the General Industrial Activities Stormwater Permit, if appropriate.

Commercial Sites:

- Ensure proper disposal of oil/grease (grease pumped/removed on regular basis, grease interceptor maintained properly)
- Ensure proper disposal of wash water from grease filters, floor mats, floor cleaning and grill cleaning.
- Ensure Outside areas are cleaned via dry methods such as sweeping, or that wash water is collected and conveyed to sewer
- Ensure Dumpsters are properly maintained – trash bags sealed, dumpster lids closed, dumpsters dry and not washed to MS4
- Ensure Employee Education Materials are displayed

The Permittees understand that these controls meet the intent of the requirement for Minimum BMPs for industrial and commercial facilities. BMPs implemented by the business operator must be consistent with

b. Regional, or watershed facilities offer the flexibility for future enhancements that would support integrated resource planning and make better overall use of limited water supplies

5. Multiple uses
   a. Because of their larger size and jurisdiction, regional, or watershed facilities present more opportunities to serve multiple purposes
   b. Regional, or watershed, facilities can often provide other values, such as, habitat improvements, public park and/or recreation facility creation or enhancement, and green space preservation

4. **Section F.b.2 BMP Requirements** states the following

The SUSMP shall include a list of recommended source control, and treatment control BMPs. The SUSMP shall require all Priority Development projects to implement a combination of on-site BMPs (to treat the runoff specifically generated from each project) selected from the recommended BMP list, including at a minimum (1) source control BMPs, and (3) treatment control BMPs. The BMPs shall, at a minimum:

i. Control the post-development urban runoff discharge velocities, volumes, durations and peak rates to maintain or reduce pre-development downstream erosion, and to protect stream habitat;
ii. Conserve natural areas where feasible;
iii. Minimize storm water pollutants of concern in urban runoff from the Priority Development Projects (through implementation of source control BMPs). Identification of pollutants of concern shall include, at a minimum, consideration of any pollutants for which water bodies receiving the development's runoff are listed as impaired under Clean Water Act section 303(d), any pollutant associated with the land use type of the development, all pollutants commonly associated with urban runoff;
iv. Be effective at removing or treating pollutants of concern associated with the project;
v. Minimize directly connected impervious areas where feasible;
vi. Protect slopes and channels from eroding;
vii. Include storm drain stenciling and signage;
viii. Include properly designed outdoor material storage areas;
ix. Include properly designed trash storage areas;
x. Include proof of a mechanism, to be provided by the project proponent or Permittee, which will ensure ongoing long-term BMP maintenance;
xi. Include additional water quality provisions applicable to individual priority project categories;
xii. Be correctly designed so as to remove pollutants to the MEP;
xiii. Be implemented close to pollutant sources, where feasible, and prior to discharging into receiving waters;

COMMERCIAL/INDUSTRIAL INSPECTIONS AND MINIMUM BEST MANAGEMENT PRACTICES

The Tentative Order Incorrectly Adds Facilities to the Commercial and Industrial Inspection Program

Permit Requirement H.2.b of the Tentative Order lists commercial and industrial facilities that must be inventoried and Requirement H.2.c.1 requires that these facilities be inspected. The Fact Sheet, pages 50 – 54 provides background for the requirements in H.2. Page 51 of the Fact Sheet states:

> "The list of industrial and commercial facilities in Requirement H.2.b is either specifically addressed in the federal NPDES regulations referenced above, or have been determined by the Permittees, in their facilities lists developed pursuant to Order No. R9-98-02, the SDRWQCB (SDRWQCB, 2002a), or the EPA to contribute pollutants to the MS4."

This statement is incorrect as:

1. The Permittees had only committed to inspecting those facilities currently inspected under the CAP, as well as:
   a. Mobile automobile and other vehicle washing (base of operations)
   b. Mobile carpet, drape, or furniture cleaning (base of operations)
   c. Mobile high pressure or steam cleaning (base of operations)
   d. Nurseries and greenhouses,
   e. Landscape and hardscape installation (base of operations), and
   f. Other commercial sites/sources that the Permittee determines may contribute a significant pollutant load to the MS4.

2. The Federal Regulations do not specifically require the inspection of specific commercial facilities, or several of the industrial dischargers listed in Requirement H.2.b.

3. The California Water Code does not require the Permittees to inspect the commercial or several of the industrial facilities listed in Requirement H.2.B

For these reasons, the Permittees request that this section be revised to conform to Section 7 of the ROWD. The Permittees have committed to continue to implement the CAP and to expand our inspection program to include those facilities listed in item #1 above. The inclusion of additional facilities, including cemeteries, golf courses, and other commercial or industrial facilities not currently inspected by the CAP would not be acceptable to the Permittees without a cost/benefit analysis to support the expenditure and a direct link between those facility types and the current impairments in the watershed. There is no justification for expansion of the inspection program due to:

1) The lack of water quality impairments related to these facilities in the Santa Margarita Region
2) The lack of any identifiable link between deficiencies in the current commercial and industrial inspection program and water quality impairments
3) The success of the Permittee's current IC/ID program, which more cost effectively addresses discharges from these types of facilities.

The Permittees also request that the referenced EPA document be cited.

xiv. Ensure that post-development runoff does not contain pollutant loads which cause or contribute to an exceedance of water quality objectives or which have not been reduced to the MEP.

Under no circumstances can a BMP be constructed in a receiving water.

Comments: The Permit directs permittees to "minimize storm water pollutants of concern in urban runoff," as well as, "be effective at removing or treating pollutants of concern associated with the project." Neither of these requirements considers feasibility, costs, or any other factor used to define MEP. A literal reading of these requirement mandates project proponents to produce pristine drinking water from their project. All discussions of pollutant removal should focus on the reduction of pollutants to the MEP.

The Permit directs permittees to "ensure that post-development runoff does not contain pollutant loads which cause or contribute to an exceedance of water quality objectives." This requirement is discussed at length in the "General Issues" section of this letter. In summary, the Regional Board has made no showing that any of these unqualified directives are consistent with MEP. Thus, these unqualified, absolute directives should be stricken from the Permit or somehow made to conform with the MEP standard.

The last sentence of this section states that "under no circumstances can a BMP be constructed in a receiving water". This statement is completely without legal foundation and in fact removes one of the most cost-effective solutions available for protecting beneficial uses in the Waters of the U.S. These solutions are multi-use regional solutions that would address the pollutants of concern in urban runoff prior to its discharge into Waters of the U.S. Therefore, this last sentence should be stricken.

7. **Section F.1.b.2.h. Infiltration and Groundwater Protection** states the following:

Infiltration and Groundwater Protection – To protect groundwater quality, each Permittee shall apply restrictions to the use of treatment control BMPs which are designed to primarily function as infiltration devices (such as infiltration trenches and infiltration basins). Such restrictions shall ensure that the use of such infiltration structural treatment BMPs shall not cause or contribute to an exceedance of groundwater water quality objectives. At a minimum, use of treatment control BMPs which are designed to primarily function as infiltration devices shall meet the following conditions: As part of the SUSMP, the Permittees may develop alternative restrictions on the use of treatment control BMPs which are designed to primarily function as infiltration devices.

i. Urban runoff shall undergo pretreatment such as sedimentation or filtration prior to infiltration.
ii. All dry weather flows shall be diverted from infiltration devices.

permitted uses of the land, density design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, are the regulations in force at the time of execution of the agreement. See Government Code §§ 65866. Development agreements have been judicially interpreted under a liberal construction to uphold their legal validity, Santa Margarita Area Residents Together v. San Luis Obispo County, 84 Cal. App. 4th 221, 100 Cal. Rptr. 2d 740 (2000).

Another example of contracts with statutory protections are subdivision improvement agreements entered into pursuant to the Subdivision Map Act (Government Code §§ 66410 et seq.). Such agreements address road, drainage, sewer and water infrastructure improvements, including layout and design (Government Code §§ 66462, 66499-66499.10). The Subdivision Map Act provides additional sources of vested right where a final map has been approved or where a vesting tentative map is involved. See City of West Hollywood v. Beverly Towers, Inc., 52 Cal. 3d 1184, 1192, 278 Cal. Rptr. 375 (1991); Bright Dev. v. City of Tracy, 20 Cal. App. 4th 783, 24 Cal. Rptr. 2d 618 (1993); and Government Code § 66498.1.

In a related area of the law, estoppel, the California Supreme Court has stated that the vested rights doctrine is grounded upon the principle of equitable estoppel which may be applied against the government where justice and fairness require it. An equitable estoppel requiring the government to exempt a land use from a subsequently imposed regulation must include (1) a promise such as that implied by a building permit that the proposed use will not be prohibited by a class of restrictions that includes the regulation in question; and (2) reasonable reliance on the promise by the property owner to his detriment. See Santa Monica Pines, Ltd., v. Rent Control Board, 35 Cal. 3d 858, 867, 201 Cal. Rptr. 593 (1984); Stanson v. San Diego Coast Regional Com., 101 Cal. App. 3d 38, 39, 161 Cal. Rptr. 392 (1980); and Wilson v. City of Laguna Beach, 6 Cal. App. 4th 543, 7 Cal. Rptr. 2d 848 (1992).

The Regional Board and the Permittees must take heed of the legal considerations discussed above to the extent that a conflict arises with the terms of Tentative Order No. R9-2004-001. Said order, in its current form, seeks to impose an extensive scheme of requirements upon a variety of land use areas consisting of: new development, redevelopment, construction activities, municipal activities and facilities, industrial facilities, commercial facilities and residential neighborhood activities.

iii. *Pollution prevention and source control BMPs shall be implemented at a level appropriate to protect groundwater quality at sites where infiltration structural treatment BMPs are to be used.*
iv. *Infiltration treatment control BMPs shall be adequately maintained so that they remove pollutants to the MEP.*
v. *The vertical distance from the base of any infiltration structural treatment BMP to the seasonal high groundwater mark shall be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained.*
vi. *The soil through which infiltration is to occur shall have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of urban runoff for the protection of groundwater beneficial uses.*
vii. *Infiltration treatment control BMPs shall not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (bus, truck, etc.); nurseries; and other high threat to water quality land uses and activities as designated by each Permittee.*
viii. *Infiltration and treatment control BMPs shall be located a minimum of 100 feet horizontally from any water supply wells. As part of the SUSMPs, the Permittees may develop alternative restrictions on the use of treatment control BMPs that are designed to primarily function as infiltration devices.*

Comment: Requiring pretreatment prior to the use of all infiltration BMPs is not consistent with most design standards available for the installation of infiltration BMPs. Pretreatment has not been found necessary in most instances. The need for pretreatment should be determined on a case-by-case basis, and left to the local permitting agency to decide. In fact, as far as we can tell, the San Diego Regional Water Quality Control Board is the only Regional Board in Southern California with this requirement.

The requirement for dry weather flows to be diverted from infiltration devices does not make sense either, as runoff from irrigation systems, footing drains, rising ground water, springs, etc. are allowable dry weather flows and should definitely be designed to flow through the infiltration device as opposed to the street. It makes a lot more sense to infiltrate these flows, and let them replenish groundwater, than to just let them discharge into the street.

8. **Section F.2.b.9 Downstream Erosion** states the following:

The Permittees shall develop numeric criteria to ensure that discharges from Priority Development Projects maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, numeric criteria shall be developed to control urban runoff

VESTED TRACT RIGHTS

The Tentative Order Is Subject To Restraints Imposed By The Legal Doctrines of Vested Rights And Estoppel In The Context Of Private Property Development

The California Supreme Court in Avco Community Developers, Inc. v. South Coast Regional Com., 17 Cal. 3d 785, 793, 132 Cal Rptr. 386 (1976) held that where a private property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction of the development in accordance with the terms of the permit. Once a landowner has secured a vested right, the government may not, by virtue of a change in the land use laws, prohibit construction authorized by the permit upon which he relied. A common scenario involving vested rights takes place where the conditions attached to a tentative map have been satisfied by a subdivider and then the local legislative body is required to approve a final subdivision map. For example, in a case involving the Subdivision Map Act (Government Code §§ 66410 et seq.), the California Supreme Court held that once all discretionary approvals are obtained then the project is subject to vesting despite the need to obtain ministerial approvals. See Youngblood v. Board of Supervisors, 22 Cal. 3d 644, 653-657, 150 Cal. Rptr. 242 (1978). Similar reasoning applied to a phased project involving a special use permit in Toigo v. Town of Ross, 70 Cal. App. 4th 309, 82 Cal. Rptr 2d 649 (1999). A vested right has been found on the part of a scrap recycler where he was allowed to continue a nonconforming use of improvements already constructed pursuant permits issued by the city, Halaco Engineering Co. v. South Central Coast Regional Com., 42 Cal. 3d 52, 207 Cal. Rptr. 672 (1986).

Another area in which vested property rights arise is based on contract. Both the United States and California constitutions contain provisions that bar state and local governments from passing any law impairing the obligation of contracts. Such laws come within the classification of invalid retrospective legislation. See United States Constitution, Article I, § 10, Clause 1 and California Constitution, Article I, § 16. Examples of such contracts in the land use context include: annexation agreements, bonded indebtedness, development agreements, subdivision improvement agreements, mineral leases and landlord/tenant leases. See Monterey Sand Co. v. Coastal Comm'n, 191 Cal. App. 3d 169, 236 Cal. Rptr. 315 (1987); Ross v. City of Berkeley, 655 F. Supp. 820, 827 (N.D. Cal. 1987); Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976); Trimont Land Co. v. Truckee Sanitary Dist., 145 Cal. App. 3d 330, 193 Cal. Rptr. 568 (1983).

In addition, certain contracts referenced above are subject to additional statutory requirements and protections. Cities and counties are authorized to enter into binding development agreements with property owners for the development of private property (Government Code §§ 65864-65869.5). Such agreements provide a specific form of vested right where the agreements can supersede any change in planning, zoning, subdivision or building regulations adopted after the execution of the particular agreements. See Government Code § 65865.4. Moreover, regulations governing

discharge velocities, volumes, durations and peak rates in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Development of the numeric criteria with its supporting documentation shall be completed in 2008 and submitted with the Permittees' application for renewal of this Order. The Permittees shall be prepared to implement the numeric criteria upon renewal of this NPDES permit in April 2009.

Comment: The Regional Board is mistaken that it is within its authority to regulate the effects on the flow regime.[5] While such effects may constitute "pollution" as that term is defined in the CWA, they do not constitute the "discharge of pollutants," as that phrase is defined in the CWA. The MS4 program is limited to controls on pollutant discharges. Other CWA programs not administered by the Regional Board are designed to address general pollution problems, such as might result from downstream erosion and scour.[6]

MS4 permits must include, "controls to reduce the *discharge of pollutants* . . . and such other provisions . . . appropriate for the control of such *pollutants*." 33 U.S.C. § 1342(p)(3)(b)(iii), CWA § 402(p)(3)(b)(iii) (emphasis added). The term "pollutant" as used in sections 301 and 402 is defined by the CWA to mean:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. (33 U.S.C § 1362(6), CWA § 502(a))

Water *per se*, regardless of what constituents are in it, is not within this statutory definition. Even "EPA does not consider flow to be a pollutant . . . ."[7] The Regional Board attempts to circumvent this problem by defining all urban runoff as "waste." However, simply because urban runoff may not be of pristine water quality, does not mean that its erosive capacity, once it enters a stream channel, is subject to the MS4 program.

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5 Also, the Regional Board's regulation of stream habitat—not tied to the discharge of waste—is beyond its jurisdiction and is an invalid permit condition. Streambed alteration is regulated under Section 1603 of the California Fish & Game Code, not under the Porter-Cologne Act. Other aspects of the Permit attempting to regulate habitat likewise are invalid.

6 Another respect in which the Permit illegally regulates "pollution" is through the provision redefining receiving waters to be part of the MS4 system. Permit, ¶ 8 ("the urban stream is both an MS4 and a receiving water."). This redefinition by fiat of open waters as public storm drains has the effect of pulling into the Permit overland, truly nonpoint, sheet flow that enters these waters. Pollutants entering these receiving waters in this way are not point source discharges regulable under the Regional Board's NPDES and MEP authority. Thus, the Permit is invalid and overbroad in this respect. The Regional Board is not authorized to subject such flow to a permit or re-classify waters of the United States as a public storm drain.

7 Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43586, 43619 (July 13, 2000).

THE TENTATIVE ORDER IMPOSES UNFUNDED STATE MANDATES

Article XIII B, Section 6 of the California Constitution requires the State to reimburse local governments for the costs associated with a new program or higher level of service mandated by the Legislature or any State agency. The one exception is for "mandates of . . . the Federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly". (Cal.Const. art., XIII B, § 9(b); Sacramento v. California (1984) 50 Cal.3d 51.) However, this exception applies only where "the State had no 'true choice' in the manner of implementation." (Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564, 1593-94.)

The Tentative Order goes beyond what is required by the Clean Water Act. Thus, to the extent the Regional Board chooses to exercise its discretion to impose such requirements on the Permittees, it must comply with the prohibition against unfunded mandates set forth in the California Constitution.

Examples of unfunded mandates include, but are not limited to:

- Requirement to inspect commercial and industrial facilities not specified in 40 CFR 122.26.
- Requirement to review monitoring reports from industrial facilities covered under the State's General Permit.
- Costs associated with the requirement to update grading ordinance to include controls prescribed by the Regional Board in Requirement G.3, including costs associated with inspections and grading plan review associated with the prescribed items.
- Requirement to prepare Individual Storm Water Management Plans
- Requirement to implement "dual inspection" of construction and industrial facilities covered under the State's General Permits.
- Requirement to implement a watershed based Monitoring and Reporting Program as opposed to a Monitoring and Reporting Program that focuses on urban runoff management.

CWA case law uniformly has found the definition of "pollutant" to not include downstream erosion. In National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), the National Wildlife Federation argued that dams require NPDES permits, and that discharges from dams amounted to a "discharge of a pollutant." The court acknowledged that among the water quality problems that may be caused by dams is the discharge of waters with the potential to cause downstream erosion. While stating that discharges from dams usually contain less sediment than upstream water, the court stated that, "the river will 'tend to restore its equilibrium [sediment] loading by scouring the downstream channel.'" Id. at 164 (alteration in original). However, the court held that discharges from dams were not discharges of pollutants, but rather, were discharges that altered water quality conditions, and as such, did not fall within the CWA definition of "pollutant" and did not require a NPDES permit. See id. at 171–72.

With respect to the definitions of "pollutant" and "pollution" in the CWA, the court noted that:

> Congress purposely limited the federal NPDES permit program to certain well-recognized pollutants and left control of other water altering substances or conditions to the states under § 208.[8] (Id. at 172)

Relying upon legislative history, the court stated:

> Had it wanted to do so, [Congress] could easily have chosen suitable language, e.g., 'all pollution released through a point source.' Instead, as we have seen, the NPDES system was limited to 'addition' of 'pollutants' from a 'point source'. (Id. at 176)

The court was persuaded by U.S. EPA's interpretation, "under which dams would not require discharge permits, but would instead be regulated under state-developed area-wide waste treatment management plans pursuant to § 208 of the [CWA]." Id. at 161.

Other courts considering these definitions have reached similar conclusions. At issue in the case of Missouri *ex rel.* Ashcroft v. Department of the Army, 672 F.2d 1297, 1303 (8th Cir. 1982), was soil erosion generated, "by fluctuations in the flowage of water from the power plant and from the reduction of oxygen as a result of water turbulence at the dam." The Court held that:

[8] In fact, there is so much regulation of regional "pollution" in the Permit, it is arguable that the Permit is a *sub rosa* 208 program, and invalid for that reason. By establishing two separate programs—the NPDES program and the 208 program—in the CWA, Congress recognized the "distinction as to the kinds of activities that are to be regulated by the federal government [or state water quality agency under delegation] and the kinds of activities which are to be subject to some measure of local control." Gorsuch, 693 F.2d at 176 (quoting S.Rep. No. 370, at 10 (1977)). Control of "pollutants" falls to the agency administering the NPDES program—in California the regional boards—whereas control of "pollution" is managed under the 208 program by the Southern California Association of Governments.

CONSTRUCTION DATABASES

The Tentative Order requires the development of a construction database that is to include "an inventory of all construction sites within its jurisdiction regardless of site size or ownership". The term "construction site" is defined as "any project requiring a local grading or building permit, including projects requiring coverage under the General Construction Permit". This requirement is overly broad as each Permittee issues many building permits and can range from the mass grading of a site to a water heater installation.

The USEPA determined that the minimum construction project worthy of regulation under Phase I are those that disturb five acres or more of land and one acre under Phase II. These projects should be adequately addressed in the database maintained by the State Water Resources Control Board. Although the definition of Storm Water Discharge Associated with Small Construction Activity (40 CFR 122.26.B.15) can include disturbances of less than one acre, it is also clear that this only applies to "disturbances of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan or development will ultimately disturb equal to or greater than one and less than five acres". It should be noted that "small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility". The Permittees request that the term Construction Site be redefined as

> "Sites undertaking construction activities including clearing, grading and excavating that result in land disturbances of equal to or greater than one acre. Construction Sites do not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity or original purpose of the facility."

The Permittees object to the proposed requirements to establish a more extensive database without a clear justification of a need and demonstration of an expected benefit commensurate with the resources needed to implement this requirement.

Although Regional Board staff have indicated that the Permittees existing systems for tracking building and grading permits may be adequate, substantial modification of these systems would be required to adequately track required inspections, enforcement actions related to construction sites as required in the Tentative Order. Further, the additional staff time required to track water quality related inspections and enforcement for tens of thousands of building and grading permits that have minimal water quality impacts could be substantial. The County of Riverside alone issued 30,000 building and grading permits last year. In addition to this extensive requirement being expensive to develop and maintain, it would also not be useful to the Permittees in managing construction-related stormwater quality. Construction sites less than one acre are effectively addressed by existing Permittee surveillance activities and community hotline and public education programs. As such, the requirement to establish and maintain such a database would not result in a water quality benefit.

> operation of the dam did not result in the discharge of a pollutant as the term is defined by the [CWA] because the discharge of a pollutant requires an addition of a pollutant from a point source and neither term applied to soil erosion or the oxygen content of the water. (Id. at 1304)[9]

Thus, the Permit is void under the CWA to the extent it is regulating downstream erosion caused by storm water. Such water quality control is reserved to the Section 208 program and is not part of the MS4 program.

9. Section G Construction

a. **Section G.3 Modify Construction and Grading Approval Process** states the following:

Each Permittee shall develop and implement a process to ensure that the discharge of pollutants to the MEP are applicable to construction and grading permits and plans prior to their approval and issuance. Such BMPs shall include the following requirements or their equivalent:

(a) Require project proponent to develop and implement a plan to manage storm water and non-storm water discharges from the site at all times;
(b) Require project proponent to minimize grading during the wet season and coincide grading with seasonal dry weather periods to the extent feasible. If grading does occur during the wet season, require project proponent to implement additional BMPs for any rain events which may occur, as necessary for compliance with this Order;
(c) Require project proponent to emphasize erosion prevention as the most important measure for keeping sediment on site during construction;
(d) Require project proponent to utilize sediment controls as a supplement to erosion prevention for keeping sediment on-site during construction, and never as the single or primary method;
(e) Require project proponent to minimize areas that are cleared and graded to only the portion of the site that is necessary for construction;
(f) Require project proponent to minimize exposure time of disturbed soil areas;
(g) Require project proponent to temporarily stabilize and reseed disturbed soil areas as rapidly as possible;

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[9] See also, United States ex rel. Tenn. Valley Auth. v. Tennessee Water Quality Control Bd., 717 F.2d 992, 998-99 (6th Cir. 1983) ("Although alterations in the properties of the water are 'pollution' under the broader definition contained in section 502(19). . . all alterations do not fit the narrower definition of 'pollutants' contained in section 502(6) . . . . Congress [has] treated 'pollutants' and 'pollution' differently and . . . section 402 is concerned with the addition of pollutants, not with water pollution generally." The Permit at issue in this petition is a section 402 permit.)

THE REGIONAL BOARD MUST COMPLY WITH CEQA

Finding 29 of the Tentative Order asserts that the Regional Board is exempt from the requirements of the California Environmental Quality Act ("CEQA") pursuant to Water Code Section 13389. However, Water Code Section 13389 only applies to actions that are required under the Clean Water Act (CWA). (See Water Code § 13372.) As Committee for a Progressive Gilroy v. State Water Resources Control Board (1987) 192 Cal.App.3d 847, 862 makes clear the exemption contained in Water Code Section 13389 is a limited exemption and does not insulate discretionary acts of the Regional Board from the requirements of CEQA. The Tentative Order goes beyond the requirements of the Clean Water Act and imposes requirements that are discretionary, not mandatory. Therefore, adoption of the Tentative Order should only occur after the appropriate CEQA review has been performed.

The remaining non-exempt provisions of CEQA require the Regional Board to consider the environmental consequences of their permitting actions and to explore feasible alternative and mitigation measures prior to the adoption of waste discharge requirements. Cal. Pub. Res. Code 21002. Substantial evidence exists which shows that the permit will have a significant impact on the environment.

Given the breadth of the Tentative Order and its potential impacts on the environment, cost and availability of housing and local funding for local facilities and services, there is good reason for the Regional Board to conduct the appropriate review under CEQA. For example, Finding 28 of the Tentative Order recognizes that certain BMPs which are "implemented or required by municipalities for urban runoff management may create a habitat for vectors (e.g., mosquitoes and rodents)". The environmental implications of this threat, along with the impacts the possible responses to this threat may also have on the environment, is just one example of the types of issues which must be studied by the Regional Board. Other issues associated with the development and implementation of certain best management practices include additional energy requirements, and potential air quality impacts and overall effects on hydrology and riverine geomorphology. These are all environmental impacts which are not CWA exemptions and should have been fully considered.

The need for the Regional Board to comply with CEQA is particularly true in light of the components of the Tentative Order which require the Permittees to conduct heightened CEQA review of projects. For example, Section F.3.a-k requires the Permittees to review their CEQA documents to ensure that stormwater-related issues are properly considered and appraised, and, if necessary, requires the revision of environmental review processes. This section goes on to mandate that certain specific items be considered for development projects. The Regional Board does not have the authority to revise the CEQA checklist or make it applicable to projects not otherwise subject to CEQA. In addition, it is the Regional Board and not the Permittees who should consider the environmental impacts created by the Tentative Order.

(h) Require project proponent to permanently revegetate or landscape as early as feasible;
(i) Require project proponent to stabilize all slopes; and
(j) Require project proponents subject to the General Construction Permit to provide evidence of existing permit coverage.

b. **Section G.5 BMP Implementation** states the following:

a. Each Permittee shall designate a set of minimum BMPs that ensure the following at all construction sites:
(1) Erosion prevention;
(2) Seasonal restrictions on grading;
(3) Slope stabilization;
(4) Phased grading;
(5) Revegetation as early as feasible;
(6) Preservation of natural hydrologic features;
(7) Preservation of riparian buffers and corridors;
(8) Maintenance of all source control and treatment control BMPs; and
(9) Retention and proper management of sediment and other construction pollutants on site.
b) Each Permittee shall implement, or require the implementation of, the designated minimum BMPs at each construction site within its jurisdiction year round. If a particular minimum BMP is infeasible at any specific site, each Permittee shall implement, or require the implementation of, other equivalent BMPs. Each Permittee shall also implement or require any additional site specific BMPs as necessary to comply with this Order, including BMPs which are more stringent than those required under the General Construction Permit.
c) Each Permittee shall implement, or require the implementation of, BMPs year round; however, BMP implementation requirements can vary based on wet and dry seasons.
d) Each Permittee shall implement, or require implementation of, additional controls for construction sites tributary to CWA section 303(d) water bodies impaired for sediment as necessary to comply with this Order. Each Permittee shall implement, or require implementation of, additional controls for construction sites within or adjacent to or discharging directly to receiving waters within ESAs as necessary to comply with this Order.

Comment: Nearly all of these requirements are beyond the mandate of the General Construction Activities Stormwater Permit (GCASP) and are extremely burdensome and overly vague, so as to create an extreme hardship to the building and construction industries. This is due to the impact on the ability to provide housing and also the loss of jobs that will occur, especially by enforcing the "minimize" grading component which **requires all Permittees to ensure that seasonal restrictions on grading occur at all construction sites**

Therefore, under both Federal and State law the Regional Board must consider the costs and the benefits of the Tentative Order. More fundamentally, the public demands consideration of economic factors in the establishment of all public policy, including public health and safety, education, homeland security and even defense. There is nothing to justify not considering economic factors in establishing requirements for public management of stormwater quality, especially in light of the current and expanding State and local fiscal crises. However, nothing in the Tentative Order or related documents indicates that such an analysis has taken place. The Permittees are very concerned about the costs associated with implementing the program set forth in the Tentative Order. We would like to see a weighing of these costs with the benefits to be derived from some of the components of the program, especially those components such as the construction and industrial inspections that are currently being conducted by other entities, including the Regional Board.

While the Permittees share the Regional Board's goal of water quality protection, the Board of Supervisors and the City Councils have been elected by the citizens of California within the Santa Margarita Region to prioritize and balance finite public resources to provide many important public facilities and services. In addition to management of runoff quality from urban development, the Cities and County are responsible for providing police and fire services, libraries, infrastructure maintenance, parks, roads, drainage facilities, affordable housing, habitat conservation, environmental quality protection and many other municipal facilities and services. Although each of these needs are important, the realities of municipal finance do not permit any need to be funded without consideration of competing needs and priorities. The prescriptive requirements proposed in the Tentative Order preclude the local elected officials the opportunity to balance water resource needs with other resource needs. Further, our elected officials and the citizens of California within the Santa Margarita Region rightfully demand that expenditures be justified in terms of demonstrated local need and effectiveness of the proposed programs in addressing the local need. Therefore, even if a cost/benefit analysis were not required, prudent public policy demands that such an analysis be conducted.

A meaningful cost/benefit analysis cannot be prepared by the Regional Board's engineers and scientists alone. Such an analysis of cost and implementation impacts will require the full participation of the Permittee financial, legal and program staff.

(Section G.5.a.2). This requirement, and in fact many aspects of this Permit seek to override all operative provisions of the GCASP, forcing enforcement responsibility for compliance onto the municipal permittees. Rather than following the USEPA guidance anticipating coordination of the state-administered programs, this Permit does not seek to "coordinate" with the GCASP, but rather alters its most fundamental provisions and requirements. The result is inconsistent standards in this region from the rest of the state. Inconsistent standards result in uncertainty in implementation, enforcement, and regulated community understanding of its obligations from one site to the next. While the provisions of this Permit state that its provisions should be enforced along with those of the GCASP, such duplicative and inconsistent regulation is contrary to the provisions of the GCASP itself, which, as a State Board Order, will control. Specifically, the GCASP provides:

> "RWQCBs shall: . . . [¶] . . . b. Issue permits as they deem appropriate to individual dischargers, categories of dischargers, or dischargers in a geographic area. *Upon issuance of such permits by a RWQCB, the affected dischargers shall no longer be regulated by this General Permit.*" (SWRCB WQ Order No. 99-08-DWQ, p. 7, ¶ D.1.b.)

By adopting this Permit, this Regional Board is issuing a permit they appear to deem appropriate both for a "category of dischargers" as well as "dischargers in a geographic area." Accordingly, by the express terms of the GCASP, adoption of the Permit in this regard will automatically nullify the responsibility of regulated entities to comply with the GCASP. This is an outcome we believe this Regional Board did not intend; nor is it an outcome we believe is appropriate.

But whether intended or not, this will be the effect of adoption of the Permit as written. (Below, we address the specific ways in which the Permit's "Development Construction Program" departs from the GCASP.) By superceding the GCASP for this region through the MS4 permit, the Regional Board abandons what has been a well-functioning, statewide system of uniform requirements, implementation, and – *usually* – enforcement. We do not believe the State Board will be anxious to abandon this system and accept differing implementation and enforcement standards, region by region. There is no evidence in the record that the Santa Margarita watershed has such unique circumstances that a region-wide abandonment of the GCASP is appropriate. If this Regional Board feels that the GCASP is deficient generally, then the appropriate course of action is to seek amendment of he GCASP by the State Board, not abandon the GCASP without just cause or an adequate evidentiary foundation.

How will this be enforced anyway? Besides, there is no justification for an arbitrary, blanket prohibition of this sort under any circumstances. Although there may be a higher potential of sediment runoff from grading construction sites during the rainy season, it should not be assumed that these sites would automatically result in water quality violations. These sites

THE TENTATIVE ORDER SHOULD CONTAIN A COST/BENEFIT ANALYSIS

The Permittees have fundamental concerns about the way in which the Tentative Order proposes to manage runoff from urban development as an element of the overall water quality management program. Chief among these concerns is the prescriptive nature of the Tentative Order, which mandates implementation of a number of programs, none of which will address an identified water quality problem or promise to provide a significant water quality benefit. Further, these programs are mandated without consideration of the funding and staffing resources that will be required to implement these programs.

The cornerstone of the National Pollutant Discharge Elimination System is the concept that the discharge of pollutants from municipal storm sewers must be controlled "to the maximum extent practicable". The MEP standard is set forth in Section 402(p) of the Clean Water Act, which requires that NPDES permits shall:

> require controls to reduce the discharge of pollutants **to the maximum extent practicable**, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(33 U.S.C. § 1342(p).)(Emphasis added.) Almost by definition, the MEP standard requires a weighing of the costs and the benefits of any program to enhance water quality. (See, e.g., 64 Fed.Reg. 68722, 68754 (Dec. 8, 1999); Clean Water Initiative, p. 119; Board Order WQ 2000-11, p. 10.)

In addition, State law requires that the Regional Board consider the costs and the benefits associated with the development of Basin Plans. Pursuant to Water Code Section 13263(a), the Regional Board must consider all of the factors set forth in Water Code Section 13241 when issuing an MS4 permit. Water Code Section 13241 only authorizes the Regional Board to require water quality conditions "that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area". As part of its analysis, the Regional Board must take into account "economic considerations". (Water Code § 13241(d). Therefore, responsible public process calls for consideration of cost/benefits (supported by analysis and quantified costs) for permit requirements which implement Basin Plans. This is particularly critical in the Tentative Order for the Santa Margarita Region where numerous new requirements are proposed that potentially pose significant expense to municipal budgets with no identified funding sources.

64 Fed Reg 68722 & 68723 require flexible interpretation of the MEP concept based on site-specific characteristics and "cost considerations as well as water quality effects ...". Thus, the Regional Board is also advised in the Federal Regulations to consider costs as a factor in determining the reasonableness and practicality of permit requirements.

should require the implementation of BMPs necessary to keep sediments on site, but should not be restricted from grading during the rainy season. If grading were disallowed during the rainy season, it would have a major impact to the building and construction industries. Not only would this cause many workers to be without employment during the rainy season, it would cause projects to take substantially longer to complete, thus increasing the cost of the project and the ultimate cost to the consumer. This would have the effect of putting more people out of reach of the American Dream, home ownership.

10. **Section K.2** states the following:

Each Permittee shall collaborate with all other Permittees to develop and implement a Watershed SWMP for the Upper Santa Margarita Watershed. The Watershed SWMP shall, at a minimum, contain the following:

Comment: As we have discussed throughout this comment letter, there are many benefits to using multi-use watershed treatment facilities, as opposed to on-site treatment. It is also possible in many situations to still comply with the Federal regulations at 40 CFR 131.10(a) which state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. There may be many instances that regional watershed solutions can be constructed to treat stormwater runoff prior to its discharge into waters of the U.S., thus complying with the waste transport restriction. Therefore, we recommend that the regional board add two additional requirements to the Watershed WQMP. These two requirements are as follows; 1) an identification and prioritization of potential multi-use watershed treatment facility locations, designs and funding; and 2) an implementation time schedule of multi-use watershed treatment facilities which can be used to address the highest priority water quality problems.

GENERAL ISSUES

1. **The Clean Water Act's receiving water quality based provisions do not apply to public storm drain permits, are inconsistent with the practicability standard for public storm drain permits, and are likely to be unattainable.**

Public storm drain permits are issued under the authority of Section 402(p) of the federal Clean Water Act. Section 402 of the federal Clean Water Act establishes the National Pollutant Discharge Elimination System ("NPDES") permitting program. Public storm drain permits—also called MS4 or municipal separate storm sewer system permits—are a kind of NPDES permit.

The general rule is that NPDES permits must contain effluent limits "necessary to meet water quality standards." This requirement is contained in Section 301(b)(1)(C) of the Clean Water

Total Phosphorus	0.15 – 0.2 mg/L
Total Nitrogen	1.9 mg/L
Nitrate as Nitrogen	0.7 mg/L
Total Kjeldahl Nitrogen	1.2 mg/L

The irreducible concentrations for Total Nitrogen and Total Phosphorus are almost twice their respective BPOs, indicating that the BPOs may be unachievable with current BMP technology.

No Future Problems with Runoff from Urban Development Are Expected

Given the effectiveness of the existing program and other local, state and federal source control programs implemented in the Santa Margarita Region, no future water quality impairments associated with runoff from urban development are expected in the Santa Margarita Region. No future problems associated with runoff from urban development are expected as the SUSMP requirements specified in the Tentative Order require implementation of project specific controls. Further, with the increased control of pollutant sources that have resulted from increased regulation of hazardous materials, controls on the use of pesticides and the existing inspection and control programs implemented by the Permittees, no impairments of beneficial uses due to runoff from urban development in the Santa Margarita Region are expected in the future.

Act. It has been interpreted as requiring Water Quality-Based Effluent Limits, or WQBELs, in certain NPDES permits.

In 1999, the governing federal appellate court interpreting the Clean Water Act in the western United States held that Section 301(b)(1)(C) does not apply to MS4 permits.[10] Rather, the Ninth Circuit held that the practicability standard of Section 402(p) replaced Section 301(b)(1)(C).[11] Section 402(p)'s practicability standard and Section 301(b)(1)(C) are mutually exclusive in that Section 301(b)(1)(C) "require[s] that level of effluent control which is needed to implement existing water quality standards *without regard to* the limits of *practicability*."[12] The Ninth Circuit observed that if Section 301(b)(1)(C) applied to MS4 permits, it would always trump the practicability standard of Section 402(p), in effect eviscerating the practicability standard. The court stated in pertinent part:

> [I]f § 1311 [Clean Water Act Section 301] continues to apply to municipal storm-sewer discharges, the more stringent requirements of that section always would control.[13]

The court said this would render Section 402(p) "superfluous," and would fail to "give effect to all provisions that Congress had enacted."[14]

Several sections of the draft permit contain WQBELs. Part 2.1 proscribes discharges from the public storm drain that "cause or contribute" to the violation of water quality standards. This type of provision clearly derives from Section 301(b)(1)(C) of the federal Clean Water Act. This can readily be seen by comparing Part 2.1 to a U.S. EPA regulation acknowledged to derive from Section 301(b)(1)(C). That regulation is 40 C.F.R. Section 122.44 (d)(1)(i).[15] It likewise is a "cause or contribute" provision.

In addition, the Permit incorporates a provision to implement and enforce approved waste load allocations (WLA's) for municipal storm water discharges and require changes to the Storm Water Quality Management Plan after pollutant loads have been allocated and approved. WLA's are required by U.S. EPA's Total Maximum Daily Load ("TMDL") program. U.S. EPA regulations state that WLA's "constitute a type of quality-based effluent limit."[16]

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10 Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999).
11 Id. at 1165.
12 Id. at 1163 (quotation marks and citations omitted; emphasis added).
13 Id. at 1165-66.
14 Id. at 1165.
15 In the preamble to the regulations promulgating 40 C.F.R. 122.44(d)(1)(i), EPA stated that the language in the regulation regarding causing or contributing to water quality exceedances was inherently connected with CWA § 301(b)(1)(C). 54 Fed. Reg. 23868, 23872 (June 2, 1989).
16 40 C.F.R. § 130.2

Management of peak flow and volume from new developments is effectively addressed by existing Permittee requirements. In general, the Permittees require peak flow and volume to be managed to pre-development conditions unless the receiving drainage has been improved to accept the increased peak discharge and volume. The requirements to control peak discharges and volume in the Tentative Order should be similarly revised so as not to negatively impact housing costs without providing an environmental benefit.

The current and projected storm flows in the Santa Margarita River are less than under natural conditions due to the construction and operation of Diamond Valley Reservoir, Lake Skinner and Vail Lake.[3] Over 50% of the Santa Margarita River watershed has been controlled by the construction of Vail Dam in 1949 and Skinner Reservoir in 1974, which created significant storage capacity in the upper watershed.[4] Due to this storage capacity, peak flow rates during major flow events for both existing and future land use conditions will be lower than under natural conditions (assuming average storage conditions in the reservoirs).[5] Further, the areas of the Santa Margarita Region that receive the most precipitation are controlled by Skinner and Vail Lakes.

Water quality problems associated with urban development in other areas that are cited in the Fact Sheet are not problematic here. This illustrates the unique watershed characteristics in the Santa Margarita Watershed and the effectiveness of the existing compliance programs implemented by the Permittees.

The New and Expanded Compliance Requirements Will Not Address the Phosphorous "Impairment"

As noted previously, the 2002 CWA Section 303(d) List of Water Quality Limited Segments lists Murrieta Creek and the Upper Santa Margarita River as impaired for phosphorus, with a low TMDL priority. Considering past and current agricultural use in the Santa Margarita Region, the presence of elevated levels of phosphorus is not unexpected.

The 303(d) listing for phosphorus is based on the Basin Plan Objective of 0.1 mg/L for total phosphorus. Some BPOs, especially for nutrients, may be unachievable using conventional stormwater BAT/BCT. The Center for Watershed Protection[6] presents a table of "irreducible concentrations" of selected contaminants, the lowest concentration that can possibly be achieved using existing BMPs. The table, reprinted below, is:

Water Quality Parameter	Irreducible Concentration
TSS	20 – 40 mg/L

[3] California Department of Finance, 2003.

[4] Philip Williams & Associates, Santa Margarita Watershed Study: Hydrology and Watershed Processes, October 26, 1998, p. 14.

[5] Philip Williams & Associates, Santa Margarita Watershed Study: Hydrology and Watershed Processes, October 26, 1998, p. 20.

[6] *Irreducible Pollutant Concentrations Discharged From Stormwater Practices*, article 65, The Practice of Watershed Protection, editors Thomas R. Schueler and Heather K. Holland, published 2000 by the Center for Watershed Protection, Ellicott City, MD.

"Cause and contribute" provisions and WLA's are not based on notions of practicability. It is not known whether water quality objectives can be met during wet weather with "appropriate control measures." It is anyone's guess as to what level of water quality can practicably be achieved in the public storm drain. Until that knowledge is obtained, it is irresponsible to include WQBELs that may be unattainable.

2. **The Regional Board has no independent basis to include water quality based limits in a public storm drain permit.**

The Fact Sheet refers to three sources of authority for permit requirements "more stringent than the federal storm water regulations." These are: (1) the Regional Board's interpretation of the requisite practicability standard of Section 402(p); (2) Section 402(p)(3)(iii) of the federal Clean Water Act; and (3) Section 13377 of the California Water Code. The Regional Board does not explicitly identify a single permit provision that is in fact more stringent than federal law. To the extent there are such provisions in the permit, the Regional Board needs to identify those aspects, so that the regulated community can understand the authority under which it is being regulated. To the extent the Regional Board is hoping to rely on one of these three sources of authority to justify the permit's water quality based provisions, such reliance is misplaced.

a. **The Regional Board's interpretation of the practicability standard.**
The practicability standard of Section 402(p) is called the Maximum Extent Practicable, or MEP, standard. While it is true that MEP is a flexible, and continually evolving, standard, the Regional Board is not free to read the word "practicable" out of MEP. Nor does MEP give permitting agencies the authority to impose unattainable or infeasible requirements.

In this instance, the agency simply does not know whether it is practicable or feasible to require the public storm drain to comply strictly with water quality standards. A feasibility or attainability study evaluating what it would take in terms of infrastructure and engineering commitments to achieve the standards has not been conducted. Would treatment works for stormwater be required? Without substantial evidence that it is practicable to meet the standards, the agency cannot by edict declare it to be so.

b. **Section 402(p)(3)(iii) of the Clean Water Act.**
Section 402(p)(3)(iii) of the Clean Water Act allows permitting authorities to include in MS4 permits "such other provisions as the Administrator or the State determines appropriate." The Regional Board may believe this provision provides a federal law exception to MEP. It does not. It simply refers to one category of controls governed by the "extent practicable" standard. This can be seen from the structure of Section 402(p)(3)(iii) which states that:

RUNOFF FROM URBAN DEVELOPMENT IS NOT A SIGNIFICANT SOURCE OF IMPAIRMENT

Urban Development is a Minor Land Use in the Santa Margarita Region

Although portions of the Santa Margarita Region are experiencing rapid growth, 94 percent of the watershed is comprised of non-urban (rural residential, agriculture, state lands, federal lands, and tribal lands) land uses.[1] It is projected that the population of Riverside County will increase approximately 20 percent by 2010.[2] Assuming that the urbanized area increases proportional to population, 93 percent of the watershed would remain in non-urban land uses in 2010. As a result, runoff from urban development is only a minor component of the storm flow received by the Santa Margarita River.

Non-Storm Runoff From Urban Development is Not a Water Quality Problem

Runoff from urban development is not a contributor to water quality and quantity in the Santa Margarita River during non-storm conditions. With the exception of rising groundwater and water in the lowest reaches of Murrieta and Temecula Creeks and deliveries of imported water from the Rancho California Water District, there is no perennial flow to the Santa Margarita River from urban development in the Santa Margarita Region. During the majority of the year and throughout the non-storm period, the entire system is essentially dry with the following minor exceptions:

- Flows resulting from springs in Redhawk and Warm Springs Creeks each of which infiltrate within a few feet of entering Temecula and Murrieta Creeks, respectively.
- Intermittent, low-volume discharges of non-storm runoff from urban development. These flows infiltrate rapidly, so there is no contiguous flow to the Santa Margarita River. However, even if contiguous flow did occur, these flows would not result in significant pollutant loading to the Santa Margarita River.
- The most significant non-storm discharges in the watershed consists of raw water supply well blow off which is allowed by the Regional Board.

Water Quality Problems Related to Runoff From Urban Development are Minor and Effectively Controlled

The single water quality impairment in the Santa Margarita Region identified by the Regional Board in the 2002 California 303(d) List and TMDL Priority Schedule is for phosphorous. However, the Basin Plan objective for phosphorous is set so low that even background conditions unaffected by urban or agricultural development exceed this limit. Given that there is no non-storm runoff from urban development to the Santa Margarita River, there is no loading of phosphorous contributing to downstream impairments during these conditions.

Although the Permittees have identified several pollutants of concern, they are effectively managed by the existing management programs and, with the possible exception of phosphorous, do not contribute to impairments.

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[1] County of Riverside Assessor, 2002.
[2] Southern California Association of Governments, May 2003.

> Permits for discharges from municipal storm sewers . . .shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions appropriate for the control of such pollutants.[17]

Parsing this provision indicates that the "other provisions" language is qualified by the MEP standard, just as are "management practices," "control techniques," and "engineering methods." While Section 402(p)(3)(iii) may be somewhat awkward in construction, there is no indication that Congress intended to nullify the MEP standard by the "other provisions" term.

c. California Water Code Section 13377.

The permit at issue is not only an NPDES permit but is also a set of Waste Discharge Requirements ("WDRs") which the Regional Board is authorized to issue under California's Porter Cologne Water Quality Control Act. Chapter 5.5 of the Porter Cologne Act pertains to WDRs that also are NPDES permits. The Fact Sheet refers to Section 13377 of the Porter Cologne Act, which appears in Chapter 5.5. Section 13377 states in pertinent part:

> Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act [CWA], issue waste discharge requirements . . . and ensure compliance with all applicable provisions of the act . . . together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

At first blush, this provision appears to require all WDRs issued by the Regional Board to include strict compliance with water quality standards. The problem with this logic is that Section 13377—in fact all of Chapter 5.5—applies only to actions required by the federal Clean Water Act. This important limitation is contained in Section 13372 of Chapter 5.5, which states in pertinent part:

> The provisions of this chapter shall apply only to actions required under the Federal Water Pollution Control Act [the Clean Water Act] and acts amendatory thereof or supplementary thereto.

[17] 33 U.S.C. § 1342(p)(3)(B)(iii).

The following procedure describes an approach to address non-jurisdictional discharges into the MS4s owned and operated by the Permittees:

3.4.1 Procedure to address discharges to Permittee MS4s from sources outside the authority of the Permittees.

The Permittees lack legal jurisdiction over discharges into their respective MS4s from agricultural activities, California and federal facilities, utilities and special districts, Native American tribal lands, and other point and non-point source discharges otherwise permitted or approved by the Regional Board.

If the Permittees Illicit Connection/Illegal Discharge (IC/ID) Detection and Elimination Program or Receiving Waters Monitoring Program identifies non-jurisdictional discharge causing, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State, the following minimum guidelines will be followed:

1) The Permittees will document the non-jurisdictional discharge.
2) When appropriate, collect samples of the non-jurisdictional discharge.
3) In emergency situations, the Permittees will utilize the Hazardous Materials Emergency Response Team and coordinate with the Office of Emergency Services and the San Diego Regional Board to control the impact of the non-jurisdictional discharge on MS4s and receiving waters.
4) The Permittees will notify the discharger verbally, at minimum, of their illegal discharge and the impact on receiving waters and provide appropriate educational materials.
5) If necessary, the Permittees will contact the appropriate enforcement agency and/or the San Diego Regional Water Quality Control Board to notify them of the non-jurisdictional discharge causing, or threatening to cause, a condition of pollution, contamination or nuisance, in waters of the State.
6) Permittees will notify the responsible entity of the availability of technical assistance and provide guidance in seeking grants and other assistance to address the non-jurisdictional discharge.

The Permittees will, as appropriate, participate in watershed management efforts with other Federal, State, regional, local agencies and other watershed stakeholders to address stormwater quality issues within the watershed.

The issue of whether Chapter 5.5 applies broadly to WDRs was addressed in Committee for a Progressive Gilroy v. State Water Res. Control Bd., 192 Cal. App. 3d 847 (1987). At issue in that case was another seemingly broad provision of Chapter 5.5, this one seemingly exempting WDRs from CEQA. In reliance on the limitation contained in Section 13372, the court limited the CEQA exemption to only those actions required by the federal Clean Water Act.

Clearly, Chapter 5.5 is simply intended to enable the Regional Board to implement federal law. Since strict compliance in MS4 permits with water quality standards is not required by the Clean Water Act, the Regional Board cannot bootstrap such a provision into the permit by pointing to Section 13377 of Chapter 5.5.

3. **State Board decisions predating the Browner case provide no basis for including water quality-based limits in a public storm drain permit.**

The federal appellate case that discussed the standard applicable to MS4 permits (Defenders of Wildlife v. Browner), was decided in September 1999 by the Ninth Circuit federal appellate court. As the State Board recently acknowledged, the Ninth Circuit is the "federal circuit court that controls the interpretation of the Clean Water Act in California."[18] The Court overturned prior U.S. EPA policy by which EPA was directing the states, including California, to include WQBELs and strict compliance provisions in MS4 permits. In response to EPA's direction on this issue, the State Board prior to September 1999 had issued several decisions holding that such provisions were required.[19] Since the Ninth Circuit issued its Browner decision, the State Board has not had occasion to revisit this issue.

The Regional Board is an agency independent of the State Board. It is entitled to presume that the State Board, like the Regional Board, will conform its practices to the Ninth Circuit's Browner ruling. Importantly, the State Board's prior decisions were based on the U.S. EPA's interpretation of Section 402(p) that was overturned in Browner. The law as it exists today is that WQBELs, such as "cause and contribute" provisions and WLAs, are not required in

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[18] See, In the Matter of the Petition of the Department of Boating and Waterways, SWRCB/OCC File A-1338, Draft Order WQ 2001-.

[19] In State Board Order WQ 98-01, the State Board found that MS4 permits "must include limitations necessary to achieve water quality standards," and that permittees must "control discharges that contribute to exceedances of water quality objectives." State Board Order WQ 98-01, § II, Finding I. The State Board also ordered that certain receiving water limitation language be included in future MS4 permits. U.S. EPA later issued the permits that were the subject of State Board Order WQ 98-01 and included different receiving water limitation language. By Order WQ 99-05, the State Board mandated that the revised language be included in future MS4 permits. Among other provisions, the specified language states,:

> The permittees shall comply with Discharge Prohibitions [ ] and Receiving Water Limitations [ ] . . . . The SWMP shall be designed to achieve compliance with Receiving Water Limitations . . . .
> State Board Order WQ 99-05.

PROCEDURE TO ADDRESS NON-JURISDICTIONAL DISCHARGES.

Summary

Tentative Order R9-2004-001 finds that urban runoff can carry pollutants that can cause, or threatens to cause, a condition of pollution or nuisance (as defined in CWC Section 13050) in receiving waters. The Tentative Order further finds that Permittees cannot "passively" accept pollutant-laden discharges from third party sources into their MS4s. The Tentative Order then prohibits discharges into an MS4 that causes, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State.

Pollutant-laden discharges from third parties can come from many different sources, both within and outside of the authority of the Permittees to control. As the Tentative Order is currently written, a discharge source outside of the Permittees' authority that causes, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State, could place the Permittees in a position of unavoidable non-compliance with the requirements of Tentative Order R9-2004-001. This condition would also exist should the discharger refuse Permittee requests to voluntarily cease the discharge.

Regional Board staff have suggested that the Permittees develop a proposed amendment to the existing DAMP whereby a procedure to address non-jurisdictional discharges that causes, or threatens to cause, a condition of pollution, contamination or nuisance in waters of the State. This procedure would be credited in the Findings of the Tentative Order as meeting MEP with regard to discharges from third party sources outside the jurisdiction of the Permittees. The procedure would ensure that the Permittees are taking an active role in promoting water quality management throughout the Santa Margarita Region, not just in areas under their jurisdiction.

A procedure to address non-jurisdictional discharges is hereby submitted as an amendment to the DAMP.

Regulatory Authority:

Finding 18 of Tentative Order R9-2004-001 states:

> "As operators of the MS4s, the Permittees cannot passively receive or discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These Discharges may cause or contribute to a condition of contamination or exceedances of receiving water quality objectives."

Provision A.1 of Tentative Order R9-2004-001 states:

> "Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC Section 13050), in waters of the state are prohibited."

MS4 permits. Since the Regional Board has no other legitimate basis for including them in this permit, they should be removed.

4. **The permit may in effect subject stormwater discharges, at least to impaired waters, to numeric limits, in conflict with case law and prior agency rulings.**

The "cause and contribute" provision of the permit in effect may impose end-of-the-pipe numerical effluent limits on stormwater. We are concerned that others may argue that stormwater discharges containing concentrations exceeding the numeric water quality objectives of the Basin Plan and the California Toxics Rule violate the permit's "cause and contribute" provision. This would be tantamount to the imposition of numeric effluent limits.

Numerical limits on stormwater have been deemed infeasible by U.S. EPA and the SWRCB. For stormwater discharges from public storm drains, EPA has found that numeric limits are infeasible given the significant complication and variability of stormwaters. Given that the "currently availability methodology for derivation of numeric water quality-based effluent limitations is significantly complicated when applied to wet weather discharges from MS4s," "EPA considers narrative [as opposed to numeric] effluent limitations requiring implementation of BMPs to be the most appropriate form of effluent limitations for MS4s."[20]

The SWRCB has held consistently that numeric limits for stormwater discharges are infeasible. The SWRCB recently explained this position to the court in the Keeper groups' challenge to the Construction Permit. The court agreed with the SWRCB, holding that the SWRCB had:

> a substantial factual basis for concluding that numeric effluent limitations on pollutants in storm water discharges from construction sites are not feasible. Given the regulatory and case law permitting narrative effluent limitations in the form of BMPs when numeric limitations are infeasible, the [SWRCB] can properly require BMPs instead of numeric limitations.[21]

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[20] NPDES Phase II Storm Water Rules, 64 Fed. Reg. at 68753; see also Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761 (Aug. 26, 1996); Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 57425, 57426-27 (Nov. 6, 1996).

[21] San Francisco Baykeeper v. California State Water Res. Control Bd., No. 99CS01929, Ruling on Submitted Matter (Sac. Sup. Ct. July 27, 2000) at 7. See also Waste Discharge Req. for City of Santa Rosa, Laguna Subreg. Wastewater Treatment, Reuse, and Disposal Fac., SWRCB WQ Order No. 2000-02 (March 3, 2000) (finding "it is not feasible at this time to establish numerical storm water effluent limits for that facilities which are not covered in 40 CFR Subchapter N [non-industrial facilities]."); Natural Res. Defense Council, SWRCB Order WQ 91-04, at *20 (May 16, 1991), 1991 Cal. ENV LEXIS 14 ("There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or in any statewide plan that apply to storm water discharges.").

WATERSHED MANAGEMENT - DEFINITION OF URBAN RUNOFF

The definition of Urban Runoff in the proposed Permit broadly includes all flows in the MS4, including stormwater and non-stormwater, whether of Urban origin or within the jurisdiction of the Permittees. However, the term is consistently used in the Tentative Order to refer prescriptively to runoff from existing developments (h.1.c.1, h.3.c.1) and new developments (F.2.b.7, F.2.b.8). The Tentative Order also uses the term to broadly cover discharges from urbanized areas under the Permittees' jurisdictions. Examples include Watershed SWMP (K.m), Education (I) and occasional references in the Receiving Waters Monitoring Program (Purpose, core monitoring, triad approach, other locations).

Based on this usage, the definition is overly broad. Replacement of the Urban Runoff definition with the following definition based on the Santa Ana Region MS4 Permit is recommended. This language has been reviewed and approved by State Water Resources Control Board counsel during the approval of Board Order R8-2002-0011.

> "Urban Runoff includes those storm water and non-storm water discharges from residential, commercial, industrial, and other urban and non-urban land uses and construction areas within the Permit Area that the Permittees have legal authority to regulate. Urban runoff excludes flows from agricultural activities (including feedlots, dairies and farms), open space, state and federal properties and other urban and non-urban land uses not under the legal authority of the Permittees. MS4 discharges often consist of a mix of Urban Runoff and other storm water and non-storm water flows from sources outside the Permittees control."

The current definition could raise problems. For example, the definition of urban runoff implies that the Receiving Waters Monitoring Program is not designed to specifically address discharges from Urbanized Areas, and that it is in fact, specifically designed to monitor discharges from other sources, including agriculture, Federal and State lands. Although this argument is raised further, and based on other reasons in the Monitoring Program paper, this alone could require that the Monitoring and Reporting Program be interpreted as an unfunded mandate that requires reimbursement as defined in the "unfunded mandate" position paper. Alternatively, the Regional Board should, and the Permittees request, require these other dischargers, and others in the watershed including Caltrans, Phase II dischargers, Tribal Lands, utilities and special districts to participate equally in funding the mandated receiving water monitoring programs.

5. **The permit relies on water quality objectives that may not be relevant to stormwater and may not reflect applicable statutory factors or reasonably achievable water quality.**

The permit incorporates and relies upon the water quality objectives from the Basin Plan.[22] The Regional Board provides no evidence that the relevant factors—economics, housing need, and wet weather—were considered. Under Section 13263 of the Water Code, the Regional Board is required to consider all of the factors enumerated in Section 13241 when issuing an MS4 permit. Cal. Water Code § 13263(a). Under Section 13241, the Regional Board is authorized to issue waste discharge requirements designed to achieve "[w]ater quality conditions that *could reasonably be achieved* through the coordinated control of all factors which affect water quality in the area."[23]

The permit should not rely on flawed water quality objectives, and certainly should not require strict compliance with such objectives. The Basin Plan's water quality objectives must be revised to appropriately reflect wet weather conditions, land use patterns, housing, and the economy.

6. **The permit, by requiring local authorities to implement certain land use controls, constrains their jurisdiction over local land use and planning matters, and essentially imposes a regional land use plan.**

Contravening both the Clean Water Act and California law, the permit attempts to regulate activities inextricably bound to local land use authority. Permittees are required to amend their General Plan and development-approval processes and procedures.

The Clean Water Act recognizes the rights and responsibilities of the states over development and land use. The permit's encroachments upon local land uses and land use authority are inconsistent with the Clean Water Act, since the encroachments do not protect and preserve local government's traditional sphere of influence.[24] California courts have recognized that "the front line role in land use planning and zoning is in the hands of the local government,"[25] as opposed to state government or executive agencies thereof. "[T]he state land use planning and zoning law 'leaves wide discretion to a local government not only to determine the contents of its land use plan, but to choose how to implement these plans.'"[26] Through the permit, the Regional Board is attempting improperly to remove this discretion, which is required to be left to the local authorities. Those permit provisions that

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22 Permit § E.13 and § Part 2.1

23 Cal. Water Code § 13241(c) (emphasis added).

24 Section 101 of the Clean Water Act states that "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States ... to plan the development and use ... of land." 33 U.S.C. § 1251(b).

25 Building Indus. Assoc. of San Diego v. Superior Ct. of San Diego County, 211 Cal. App. 3d 277, 291 (1989).

26 Id. at 296 n.12 (quoting Yost v. Thomas, 36 Cal. 3d 561, 565 (1984)).

The Compliance Schedule Proposed in the Tentative Order Fails to Consider Cost Impacts

To determine the impact of the accelerated implementation schedule proposed in the Tentative Order, the Permittees have reviewed their administrative, technical and fiscal resources and existing compliance programs. These analyses have determined that the Permittees could not reasonably implement this program within the prescribed compliance schedule with available staff resources. To meet the compliance schedule the Permittees would be required to hire consultants and authorize overtime to assist in expediting development and implementation of the proposed compliance programs. Additionally, the schedules do not recognize that the Permittees will need to rely on the same staff resources to develop a number of expanded and new MS4 permit compliance programs simultaneously. This would significantly impact local resources that must also fund basic public services (fire, police, libraries, etc.). Further, during this period the District and County are also being required to develop and implement compliance programs responsive to MS4 permits issued in the Santa Ana and Colorado Regions, and the City of Murrieta must develop and implement compliance programs in the Santa Ana Region. Significant public resources could be saved without impacting water quality by revising the Tentative Order's implementation schedule.

Proposed Alternative Compliance Schedule

The accelerated compliance schedule is inappropriate, wasteful of public resources and unnecessary for water quality protection. The Permittees have proposed a revised compliance schedule based on the requirements in the Tentative Order and the Permittees' fiscal and administrative analysis of internal procedures. The proposed implementation schedule would:

- With exception of the SUSMP, develop the required programs within 365 days of permit adoption. Compliance programs that do not require ordinance revision would be implemented within the 365-day period.
- Produce the Individual and Watershed SWMP documents, including the SUSMP, within 640 days of the Tentative Order adoption.
- Certify legal authority and implement remaining programs within 640 days of Tentative Order adoption.

The Permittees believe that the proposed implementation schedule is reasonable, is protective of water quality, and responsibly uses fiscal and administrative resources. It also allows for deliberate development of compliance programs and opportunities for public review and comment of proposed ordinances and compliance programs. The Permittees request that the Regional Board revise the compliance schedule based on our recommendations or provide the Permittees with a cost-benefit analysis to support the Tentative Order's existing implementation schedule.

improperly regulate activities within the purview of local governments should be removed or revised from the permit.

CONCLUSION

We are very concerned about the cost effectiveness of the Permit in relation to specifically, what the anticipated efficacy is of this Permit in terms of improving overall water quality. The Permit should provide actual improvement of water quality, not simply attempts at incremental decreases in future contributions.

As to the maximum extent practicable consideration, both the Regional and State Boards have not properly addressed key elements of the "practicality" component – i.e., technical and cost feasibility. While cleaning up a problem decades in the making certainly must be a priority, it will not be accomplished on the back of other critical social needs in California, such as housing and jobs. Even with the marginal cost estimates relied upon by Regional Board staff (figures we vigorously dispute), there is no consideration as to the effect of those marginal costs on jobs and the availability of housing for those most in need.

In consideration of the aforementioned comments and recommendations, CICWQ respectfully requests that the Board give further review to the proposed Permit and make modifications that will result in a more equitable and balanced approach for addressing our collective regional water quality needs. CICWQ would be pleased to discuss these issues in greater detail at any time and assist Board staff with making any of the recommended modifications.

CICWQ recognizes that the stakes are very high with regard to the development of a permit that the Board believes will improve water quality. The coalition also recognizes that there are a number of stakeholders involved in the process – all of which have specific concerns they want to have addressed. Yet, the most important thing to keep in mind is that this permit is not just about water quality. It is also about housing, jobs and economic growth. The absence of any meaningful consideration of these issues, in an effort to improve water quality at any cost, will have an immediate and significant impact on affordable housing, jobs, wages and livability. Meanwhile, there would be little, if any, certainty as to just how much water quality improvement would really be achieved.

We urge you to thoroughly review the comments provided by CICWQ and ask yourselves at what point water quality improvement efforts should be allowed to compromise the economic livelihoods of our working families, diminish new home production, increase housing costs, and jeopardize our regional economic strength.

We are confident that, by working together, CICWQ can assist you in achieving balance that will greatly improve water quality while also meeting our other regional obligations and needs. We thank you for your consideration of our comments.

The Compliance Schedule Proposed in the Tentative Order Fails to Consider Local Processes

Section E.2 of the Fact Sheet asserts that the implementation schedule proposed in the Tentative Order is practicable based on:

- Compliance with a one-year schedule by MS4 Permittees in San Diego and Orange Counties.
- Regional Board staff communications with Permittee staff.
- Available models that can be used as examples.
- The requirements are based on established regulatory requirements.

The Tentative Order reflects a lack of recognition to local differences in the procedural requirements associated with development and implementation of programs by the Permittees. The local schedule constraints were documented and presented to Regional Board staff by the Permittees prior to issuance of the Tentative Order. These procedural requirements and constraints provide for data gathering, program development, public involvement, Permittee budgetary processes, State procedural requirements for ordinance adoption, compliance with internal procedures and other practical considerations. In order to revise ordinances and certify legal authority within the prescribed timeframe, the ordinance revisions may require the implementation of emergency action processes that bypass public notice and comment procedures that are reserved for identified threats to public health and safety

Permittee staff acknowledges that Regional Board staff have communicated their desires and expectations regarding the proposed requirements of the Tentative Order. However, Permittee staff cannot respond to Regional Board staff desires in the same manner as private sector organizations. Permittee staff, like Regional Board staff, cannot commit public resources to initiate changes in District, County or City policy and programs without approval from their respective Boards. Such approval requires clear justification based on specific requirements, i.e., adoption of Permit requirements. Further, in the dialogue with Regional Board staff the Permittee staff provided documentation that the existing program is effective and that the imposition of exceptionally stringent requirements developed for San Diego and Orange Counties is not warranted. Therefore, although the Regional Board and Permittee staffs were engaged in a dialogue, this did not provide additional "lead time" that would reduce the time needed for development of compliance programs.

The Permittees are aware of and have reviewed many models developed to address urban runoff management that can be considered in the development of compliance programs in the Santa Margarita Region, including those referenced by Regional Board staff. However, the Santa Margarita Region, like other areas covered by MS4 permits, is unique. Although models can be used as general guidance, the compliance program must be tailored to the unique water quality conditions and characteristics of the Santa Margarita Region. If this were not the case, a statewide, or even a nationwide permit and compliance program would be appropriate.

The Permittees agree that the regulatory requirements have not changed since issuance of the Phase I regulations in 1990. The existing compliance program, which is responsive to the MS4 permit issued by the San Diego RWQCB and USEPA Region IX, is in compliance with these regulatory requirements and is protective of water quality. As noted elsewhere in our comments, the compliance programs have been notably effective. Therefore, there is no justification for the imposition of new and expanded compliance requirements on such an accelerated schedule.

If you have any questions, please feel free to contact me at (909) 396-9993 or tpiasky@biasc.org.

Respectfully,

Timothy Piasky
Director of Environmental Affairs

SANTA MARGARITA REGION MS4 PERMIT COMPLIANCE SCHEDULE

The Tentative Order proposes requiring the Permittees to implement new and expanded compliance programs. Implementation requires five steps:

1) Review existing programs for compliance with the Tentative Order.
2) Revise or create compliance programs for areas that are found deficient.
3) Identify funding and staffing needs and sources.
4) Revise and adopt ordinances to require the implementation and enforcement of the additional and expanded compliance programs and ensure that violations of the ordinances can be enforced by sanctions.
5) Have city attorney/County Counsel certify that their respective local government agency has the authority to implement and enforce the compliance requirements.

The new and expanded compliance programs must be developed, implemented and codified within 365 days of adoption. Further, the Tentative Order requires city attorneys and County Counsel to certify that their ordinances include provisions for sanctions to enforce compliance programs mandated by the Order within 365 days of adoption. Grading ordinances must be revised within 180 days of adoption.

The Compliance Schedule Proposed in the ROWD is Protective of Receiving Waters

In the ROWD the Permittees committed to review their ordinances within 6 months of Permit adoption, and as necessary, revise these ordinances and certify legal authority within 18 months of Permit adoption. This schedule was based on the continued countywide implementation of programs developed in the Santa Ana Region and a reasonable use of Permittee resources. Justification was not provided to describe why the compliance programs and schedule proposed in the ROWD would not be protective of water quality and what benefits would be realized in the Santa Margarita Region by the compliance requirements and accelerated implementation schedule proposed in the Tentative Order. Lacking such justification, the Permittees cannot justify use of emergency procedures to meet the specified compliance schedule.

The Compliance Schedule Proposed in the Tentative Order Will Not Provide Additional Water Quality Benefits

No justification is presented to support the compliance schedule proposed in the Tentative Order or to justify why the schedule proposed in the ROWD is not protective of water quality in the Santa Margarita Region. The justification is not, and the Permittees maintain cannot, be based on a credible threat to water quality or public health and safety in the Santa Margarita Region.

Budget will take a $145 million hit

BY MICHAEL CORONADO
THE PRESS-ENTERPRISE

Supervisors today will get a grim financial picture of the county's current and future budget.

The mid-year budget report outlines millions in losses from state revenue and burgeoning shortfalls from the county's hospital that will continue this year and next.

County departments are expected to bear a substantial portion of the estimated $145 million in lost revenues and increasing costs of doing business for the remaining year and into next.

For the 2003-04 budget, those revenue losses come from a variety of sources, including the vehicle license fee backfill and hospital losses.

2003-04 budget shortfalls: $10 million
2004-05 budget shortfalls: $115 million

The county hospital is also an estimated $12 million to $16 million in the hole for this year and is expected to face the same losses in 2004-05.

The county's overall budget for 2003-04 is approximately

PLEASE SEE BUDGET, B3

BUDGET

CONTINUED FROM B1

$3 billion, with a discretionary general fund of $423 million.

For 2004-05, the tens of millions in lost revenue will result from property tax shifts, increasing expenses to run the county's programs and departments and estimated hospital losses.

To shore up some of that lost revenue, all county department heads will be asked to cut spending by an estimated 8 percent.

How those managers handle those cuts — through layoffs, furloughs or tighter budgets — will result in an estimated $26 million in savings.

Those savings are expected to make up $26 million in property taxes that the county would have received from the state that will instead be shifted to schools in order to help balance the state budget.

"It's not going to get any better any sooner," said Ed Corser, the county's finance director from his office on Monday.

It is probable the cost-saving measures will have a significant impact on public services, including public safety, Corser said.

In addition, Larry Parrish, the county's executive officer, outlined an immediate hiring freeze for positions paid for by general fund dollars across all departments in the county's mid-year-budget report.

It's still not certain how the hiring freeze will affect, if at all, the hiring of new deputies and nurses.

Though the county's budget for 2004-05 is yet to be drafted, things like cost-of-living raises for public safety personnel and improved staffing levels at fire stations will cost more than $21 million in extra expenses to the county's general fund.

"This is going to be a tough year," Corser said. "We'll outgrow this in the next couple of years."

One-time revenues, such as tobacco settlement money, developer fees previously collected from construction projects and reserves, will help bridge the remaining losses but won't be available for next year.

"That means we'll be scrambling for that money again," Corser said.

City of Temecula

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(909) 694-6444 ▪ Fax (909) 694-1999

Michael S. Naggar
Mayor

Jeff Commerchero
Mayor Pro-Tem

Ron Roberts
Councilmember

Jeff Stone
Councilmember

Chuck Washington
Councilmember

(909) 506-5100
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January 27, 2004

Mr. John H. Robertus, Executive Officer
California Regional Water Quality Control Board – San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA., 92123-4340

Dear Mr. Robertus,

The City of Temecula (City) is a co-permittee on the Santa Margarita River (SMR) watershed Municipal Separate Storm Sewer (MS4) permit. The City has initiated a review of Tentative Order No. R9-2004-001, and the Fact Sheet. The Fact Sheet, containing 72 pages of information not previously released, and the new and expanded requirements proposed in the Tentative Order, including items not previously discussed with City staff, are extensive. Furthermore, the corresponding compliance programs and resources needed to implement these requirements are significant.

Due to the holidays and the deadline for filing agenda items for consideration by the City Council, staff effectively had nine working days to review the Tentative Order since receiving it on December 15. Therefore, the City is only able to submit initial comments on the proposed compliance requirements and the potential budgetary and operational impact of these requirements at this time. Additional comments may be included at a later date.

While the City shares the Regional Board's goal of water quality protection, the City must prioritize and balance finite public resources to provide numerous vital public facilities and services. In addition to police and fire services, the City is responsible for installation and maintenance of infrastructure (roads, drainage facilities, etc.) and other public facilities (parks, libraries, community centers, etc.) and for providing recreational programs, affordable housing, habitat conservation, etc. Although all of these needs are important, municipal finances do not permit any one of them to be funded without consideration to competing needs and priorities. All proposed programs and expenditures must be justified in terms of need and effectiveness.

In reviewing the Tentative Order, there is no equitable exchange between significant expenditures associated with the Tentative Order and need. To date, the Regional Board has not provided substantial evidence of significant environmental imbalances within the SMR watershed sufficient to warrant support of the new and expanded compliance requirements outlined in the Tentative Order. Based on the City's initial review of these requirements, implementation of the proposed new and expanded requirements will exceed our available resources and will significantly impact the City's other public facilities and services. These impacts will be exacerbated by the

86321.1

January 27, 2004

Mr. John Robertus Executive Officer
California Regional Water Quality
Control Board - San Diego Region
Re: Tentative Order No. R9-2004-001
NPDES No. CAS0108766

SIGNATURES OF CO-PERMITTEES

THE COUNTY OF RIVERSIDE JOINS IN THE COMMENTS SET FORTH IN THIS LETTER.

SIGNATURE Barbara Dunmore

PRINTED NAME: Barbara Dunmore

DATED: January 27, 2004

proposed State budget that will further reduce funding available to the City. Other potential sources of funding, including fees, surcharges, establishment of a utility, have been evaluated and it has determined that none are realistically available to the City.

The City also has fundamental concerns about the way in which the tentative Order proposes to manage urban runoff quality as an element of the overall water quality management program. Among these concerns is the prescriptive nature of the Tentative Order, which mandates implementation of a number of programs, none of which address an identified water quality problem associated with urban runoff *in the Santa Margarita Region* or promise to provide a significant water quality benefit beyond that provided by the program proposed by the SMR Permittees. Further, these programs are mandated without an economic analysis. References to compliance costs throughout San Diego and Orange County do not constitute an economic analysis. Even if not required, an economic analysis should be expected as prudent and responsible public policy.

The City is particularly concerned with the compliance schedules proposed by the Tentative Order. These schedules fail to recognize municipal budgetary processes, logistical needs for program implementation, State procedural requirements for ordinance adoption, and other practical considerations that will be faced in implementing new programs. Nothing is provided to justify why a 365-day compliance schedule (180-day schedule for the grading ordinance) is appropriate and necessary, or why any other schedule is not.

The City is currently implementing various programs outlined in the existing MS4 permit in addition to recommendations requested by Regional Board staff. Regional Board staff have recognized that the City's current construction inspection program has been effective in controlling and eliminating erosion and sediment discharge from all sites throughout the City. As previously discussed with Regional Board staff, the Tentative Order proposes modifications that will compromise the program's effectiveness in protecting water quality. The Tentative Order sets inspection frequencies to prioritized sites without consideration of potential impacts on receiving water quality. The City requests more flexibility in prioritizing construction inspection needs without a "one-size-fits-all" list of sites and schedules dictated by the Board.

Another effective program is the Compliance Assistance Program (CAP) that covers inspections throughout the commercial and industrial sectors. This program is a carry-over from the existing Santa Ana River watershed MS4 program and has been very effective in Temecula. The Tentative Order outlines an expanded commercial/industrial inspection program. However, there are no water quality problems in the Santa Margarita region associated with the additional facilities sufficient to warrant the expanded requirements. Further, the proposed expansion of this inspection program would not provide meaningful receiving water quality benefits. The City believes the existing program adequately protects receiving water quality and should not be modified.

The City is submitting these initial comments in the interest of developing a MS4 permit that can be implemented within available resources and is responsive to the needs of the Santa Margarita region by the Permittees. In the interest of full consideration and comment on the Tentative Order, the City requests an additional thirty days for review prior to the public hearing. The City is committed to water quality protection in a manner that balances this objective with the resources, needs and expectations of the community. We look forward to discussing these concerns with you in order to effectively implement a workable permit.

Please contact Aldo Licitra, Associate Engineer/NPDES, at 909-694-6411 if you have any questions regarding this information. Thank you.

Mr. John Robertus Executive Officer
California Regional Water Quality
Control Board – San Diego Region
Re: Tentative Order No. R9-2004-001
NPDES No. CAS0108766

January 28, 2004

SIGNATURES OF CO-PERMITTEES

THE CITY OF MURRIETA JOINS IN THE COMMENTS SET FORTH IN THIS LETTER.

SIGNATURE [signature]

PRINTED NAME: James E. Kirkley, Director of Public Works

DATED: Jan 28, 2004

Sincerely,

City of Temecula
Michael S. Naggar, Mayor

Attachment: Initial Comments

Cc: Shawn Nelson, City Manager
Jim O'Grady, Assistant City Manager
Bill Hughes, Director of Public Works

Mr. John Robertus Executive Officer
California Regional Water Quality
Control Board – San Diego Region
Re: Tentative Order No. R9-2004-001
NPDES No. CAS0108766

January 27, 2004

SIGNATURES OF CO-PERMITTEES

THE CITY OF TEMECULA JOINS IN THE COMMENTS SET FORTH IN THIS LETTER.

SIGNATURE W-H

PRINTED NAME: WILLIAM G. HUGHES
DIRECTOR OF PUBLIC WORKS/ CITY ENGINEER

DATED: 1-28-04

City of Temecula
Initial Comments
Tentative Order No. R9-2004-001
NPDES No. CAS0108766

The City of Temecula has reviewed the Tentative Order and Fact Sheet and submits the following initial comments pertaining to the requirements and implementation of the Tentative Order. First, we have addressed concerns we have on a program level, and then we have outlined our specific concerns pertinent to specific sections within the Tentative Order.

PROGRAM-LEVEL CONCERNS

1. Urban runoff constitutes a minor component of the flows and loading to Murrieta and Temecula Creeks

Based on our knowledge of the water resources in the permitted area, urban runoff is only a minor contributor to the water quality concerns in the Santa Margarita River (SMR) region presented in the Fact Sheet. Virtually all of the flows in Murrieta and Temecula Creek consist of seasonal rising groundwater and groundwater-well discharges by local water districts. In addition, almost one-third of the Santa Margarita Watershed is comprised of non-urban (rural residential, agriculture, State lands, Federal lands, Tribal lands) land uses[1]. For the average annual rain event, it is estimated that 89% of the volume of runoff in the SMR region is due to non-urban land uses not regulated under the federal storm water program. For the 100-year, 24-hour rain event, 93% of the volume of runoff will be due to non-urban land uses. As such, the Tentative Order's approach of blanketing the Riverside County SMR region with effectively the same permit conditions as with the more intensely developed coastal urban areas within San Diego and Orange Counties is not justified.

2. The Tentative Order inappropriately requires the City to assume the Regional Board's enforcement responsibilities

The City is required to review, revise, and adopt ordinances, set a penalty structure, and impose fines in order to enforce the components of the Tentative Order. Although the Regional Board believes that the local jurisdictions have greater access and authority to implement these requirements, the City cannot assume enforcement responsibilities of another agency. The California Water Code expressly designates the State Board (and hence Regional Boards) as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act. Therefore, enforcement resulting from violations of the Act is the responsibility of the Regional Board and delegation of this authority is not authorized.

3. The Tentative Order inappropriately requires the City to inspect sites less than 1 acre in size

The Phase II regulations state "The Phase II Final Rule requires an operator of a regulated small MS4 to develop, implement, and enforce a program to reduce pollutants in storm water runoff to their MS4 from construction activities that result in a land disturbance of greater than or equal to one acre."[2] The tentative Order expands this beyond the requirements of the federal NPDES program by requiring the City to inspect facilities smaller than one acre on an as-needed basis. This is effectively an unfunded state mandate and should be removed from the Tentative Order.

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[1] County of Riverside Assessor, 2002.
[2] Storm Water Phase II Compliance Assistance Guide. Washington D.C. EPA 833-R-00-002

in the permit adoption process. It is critical that the local community, including the local elected representatives, be given ample opportunity to comment, since they will be significantly affected by the cost of the compliance requirements proposed in the Tentative Order.

Conclusion

The Permittees are submitting these initial comments as part of the on-going, open dialogue with the Regional Board to help develop an appropriate, effective and workable MS4 Permit for the Santa Margarita Region. The Permittees are committed to water quality protection in a manner that balances this objective with the universe of needs and expectations of the citizens of California within the Santa Margarita Region. We look forward to discussing the initial concerns of the Permittees and our proposal to work collaboratively to resolve these concerns at the February 11, 2004 hearing.

If you have any questions regarding these initial comments, please contact me at 909.955.1250 or Jason Uhley at 909.955.1273.

Very truly yours,

WARREN D. WILLIAMS
General Manager-Chief Engineer

Attachments: Position Papers
Newspaper Article

c: Barbara Dunmore, County Executive Office
Steve Mandoki, City of Murrieta
Shawn Nelson, City of Temecula
Alex Gann, County Executive Office
Aldo Licitra, City of Temecula
Bob Moehling, City of Murrieta
Steve Stump
Jason Uhley
Tina Tuason
Bob Morris, CRWQCB - San Diego Region

4. The Aggressive Compliance Schedule Proposed in the Tentative Order Is Overly Burdensome to the City

The tentative Order proposes requiring the City to implement new and expanded compliance programs. As written, the Tentative Order's program implementation requires four steps:

1) Review existing programs
2) Revise or develop programs for areas found deficient
3) Revise ordinances to require the implementation and enforcement of the additional and expanded compliance programs and ensure that violations of the ordinances are enforced by sanctions.
4) Have the City Attorney certify that the City has the authority to implement and enforce the compliance requirements.

In addition, the new and expanded compliance programs must be developed, implemented and codified within 365 days of adoption, while Grading ordinances must be revised within 180 days. Further, the Tentative Order requires the City Attorney to certify that the ordinances include provisions for sanctions to enforce compliance programs mandated by the Tentative Order within 365 days of adoption.

Regional Board staff have indicated in the Fact Sheet (Page 32) that the implementation schedule is based on the successful implementation of similar Orders in other regions within 365 days. Regional Board staff have also indicated that the implementation of prescribed programs will not have a significant impact on City resources. The City has initiated a review of its administrative, technical and fiscal resources, and existing compliance programs. Our review indicates that the City cannot reasonably implement this program within the prescribed timeframe without affecting other resources allocated for basic public services (i.e. fire, police, etc.).

The City believes that the accelerated compliance schedule proposed in the Tentative Order is inappropriate. The compliance schedule for program development and implementation proposed in the Tentative Order appears arbitrary and does not recognize the practical and procedural logistics faced by municipalities. Our schedule is based on substantial efforts to determine realistic goals that will achieve successful programs. The compliance schedule proposed in the Tentative Order is based on timeframes dictated to other local governments rather than being based on specific watershed characteristics and impairments or potential threats to water quality conditions in the Santa Margarita region. According to the Regional Board staff's responses to comments during Orange County's municipal storm water permit adoption process, "The co-permittees are provided 365 days to develop the model SUSMP and an additional 180 days for the local SUSMP. One and a half years should be sufficient to develop the necessary ordinances." There is no justification for providing the Riverside County SMR watershed permittees less than the 18 months deemed sufficient for Orange County permittees. However, upon further review of our current resources and future needs, the City believes that this schedule is still too aggressive and requests 21 months for effective compliance.

Regional Board staff has made an inference to using documents from other regions. However, many permittee-specific elements preclude the simplistic approach of "cutting-and-pasting." In fact, a "one-size-fits-all" approach alluded to by Regional Board staff for developing a Model SUSMP and then a local SUSMP does not recognize watershed characteristics. The City believes that the approach of blanketing the Riverside County SMR area with effectively the same permit conditions as with the more intensely developed coastal urban areas within Orange and San Diego Counties will not be effective. The Tentative Order does not consider the differences between regions with varying public comment periods,

More specific concerns regarding the Tentative Order include the lack of evidence to support several of the findings in the Tentative Order, the lack of a cost/benefit analysis regarding the Tentative Order consistent with prudent public policy, the Tentative Order's inspection components, compliance schedule, compliance with and conditions relating to the California Environmental Quality Act (CEQA), and other related concerns. Each of these concerns is set forth more fully in the following position papers that are attached and incorporated by reference into this comment letter:

- Vested Tract Rights
- Santa Margarita Region MS4 Compliance Schedule
- Need for Revision to Monitoring Program
- Watershed Management - Definition of Urban Runoff
- Commercial/Industrial Inspections and Minimum Best Management Practices
- Free and Open Access
- Procedure to Address Non-Jurisdictional Discharges.
- Runoff From Urban Development is Not a Significant Source of Impairment
- The Tentative Order Should Contain a Cost/Benefit Analysis
- The Regional Board Must to Comply with CEQA
- Construction Databases
- The Tentative Order Imposes Unfunded State Mandates

Since the inception of the municipal stormwater program 14 years ago, the Riverside County Permittees have been proactive in working with Regional Board staff to develop workable MS4 Permit requirements and in implementing effective programs to manage runoff from urban developments in the Santa Margarita Region. These continue to be our objectives. As described in the attached comments, based on our initial review the Tentative Order is neither workable nor is it applicable to the conditions in the Santa Margarita Region.

In preparing the Report of Waste Discharge submitted to the Regional Board, the Permittees:

- Evaluated the contributions of runoff from urban development to identified receiving water quality problems in the Santa Margarita Region and assessed the potential for future contributions.
- Reviewed the Riverside County DAMP to assess those elements that are working and identified modifications needed to address water quality impairments associated with runoff from urban development in the Santa Margarita Region.
- Developed implementation schedules that recognized the realities of municipal procedures, budgetary processes, and funding limitations.

The Permittees request that at minimum, a second Regional Board hearing be conducted in the Santa Margarita Region of Riverside County. The purpose of this hearing, which should be held prior to the Permit adoption meeting, would be to review a revised Tentative Order and to provide the local community that is directly affected by the Tentative Order an opportunity to more directly participate

City Council reviews, Planning Commission reviews, Committee reviews, legal counsel reviews, and other factors.

5. The Tentative Order does not contain a cost-versus-benefit analysis

Under federal and state law, the Regional Board must consider the costs and the benefits associated with the Tentative Order and not leave this assignment to the City as the requirements are in effect and unavoidable non-compliance is inevitable. Even if not mandated, it is poor public administration to NOT consider economic factors in establishing requirements that will require expenditures of significant public resources for any purpose, including urban runoff management. Nothing in the Tentative Order indicates that such an analysis has been performed. The City is concerned that a state agency is not considering the costs associated with the new and expanded compliance requirements, especially given the fiscal emergency faced by the budget crises faced by California.

6. The Tentative Order does not consider funding mechanisms for municipalities

Currently, the Regional Board receives a funding source from NPDES fees associated with municipalities, developers, business owners, etc. These fees should cover the costs associated with the Board's compliance enforcement activities including inspections. However, the Regional Board cannot effectively conduct enforcement activities at all permitted sites due to limited resources. As a result, the Tentative Order requires permittees to conduct detailed field inspections at all sites that have been issued NPDES permits but without any equitable distribution of the fees or consideration to other's limited resources.

7. The Tentative Order does not include a Safe Harbor Provision

Neither the discharge prohibitions nor the receiving water limitations contains a Safe Harbor Provision stating that, as long as the City complies with the tentative Order, it cannot be sued just because the programs aren't immediately successful. This provision is crucial to protect the City from becoming liable to third parties once it has implemented the program mandated by the Order. Without this provision, the City will be exposed to unwarranted threats of third-party lawsuits, even when the City is making a good-faith effort in trying to meet the obligations under the Tentative Order.

CONCERNS PERTAINING TO SPECIFIC SECTIONS OF THE ORDER

Section II. D. Legal Authority:

In principle, the City shares the same goals of water quality as the Regional Board, however, the City does not believe it should be obliged to provide required assistance in conducting field inspections throughout businesses and construction sites that have General industrial and construction permits. The City does not agree with collateral assistance without an equitable reimbursement mechanism, especially since the SWRCB receives and retains all fees from the permitted Construction and Industrial activities and does not inspect all sites. As written, the Tentative Order will potentially require additional full-time inspectors, administrative support, consultants, and analytical laboratories in order to effectively implement these inspection requirements. The California Constitution requires the State to reimburse local governments for the costs associated with new programs or higher levels of service mandated by the Legislature or any State agency. The Regional Board should comply with the prohibition against un-funded mandates.

It should be noted that, although this area has experienced significant growth over the past several years, the current population of approximately 168,000 is just over half of the ultimate build-out estimate for the watershed. Less than 20% of the Santa Margarita Region will ultimately be urbanization under the County's General Plan, and ultimate build-out may substantially be achieved within the next several years. It should be noted that the Regional Board and USEPA Region IX, in adopting the existing MS4 Permit for the Santa Margarita Region, indicated that the existing program complies with the requirements of the Clean Water Act.

In reviewing the Tentative Order, we are asking the same questions that we expect the Board of Supervisors, City Councils and the citizens to ask as authorization and funding for implementation of the proposed new and expanded programs is requested, including:

- What are the problems associated with runoff from urban development in the Santa Margarita Region to be addressed by the new and expanded compliance requirements proposed in the Tentative Order?
- What existing programs address these problems?
- Are existing programs to manage runoff from urban developments in the Santa Margarita Region effective? If these existing programs are not effective, what specifically needs to be done to improve their effectiveness?
- What new and expanded programs to control urban runoff quality are being proposed in the Tentative Order and why are they needed?
- Will the new and expanded programs proposed in the Tentative Order solve or even affect the water quality problems associated with runoff from urban development in the Santa Margarita Region?
- How will these new and expanded programs to control runoff from urban development in the Santa Margarita Region be funded (federal/state funding, permits/fees, special assessments, general fund)? Will the demands of new and expanded compliance requirements impact the resources needed to maintain local services and facilities?
- What is the schedule for implementing the proposed compliance requirements? Are the Permittee procedural constraints recognized in the schedule? Are existing funding, staffing and other resources sufficient to meet the compliance schedules? If not, are the processes needed to obtain additional resources factored into the schedules? How does the proposed schedule tie into other efforts in the watershed, i.e., the Triennial Review, TMDL studies, etc.?
- How will we know if the proposed compliance requirements have addressed the identified problem(s), if any, associated with runoff from urban developments in the Santa Margarita Watershed? Who will measure our progress and make such a determination?

Section II. E. Storm Water Management Plan (SWMP):

The permittees have provided a Gantt chart demonstrating an optimistic schedule in developing the SWMP document, including peer review, public review, adoption, and implementation in parallel with our current compliance activities. Based on our estimates, the City believes that the SWMP document can be adopted within the 365 days required by the Tentative Order. However, to have "completed full implementation" as the Tentative Order is currently written will require additional time for reviews, revisions, adopt peripheral ordinances to enforce the programs specified in the SWMP and transfer written text into implementable field activities, develop training material, train inspectors and other field personnel, conduct training among municipal departments, provide modifications to the programs as implementation is attempted, bridging gaps between text and applicability, etc. The City requests that the Tentative Order be revised to provide 9 months to achieve "full implementation" once the SWMP is adopted.

Section II. F. Development Planning:

Various provisions of the Tentative Order require the City to modify its General Plan, land use ordinances, and CEQA process. In the Clean Water Act, Congress recognized that land use was a local matter. Land use planning and zoning lie in the hands of the local governments, and local governments have discretion to determine the content of their land use plans and to choose how to implement those plans. Despite Federal and State policy, the Tentative Order infringes on the authority of local governments to determine the content of their land use plans and how to implement them. The City does not believe that the Regional Board has the authority to impose such requirements. Therefore, the City requests additional discussions with the Regional Board to resolve this issue.

The City of Temecula does not believe that submitting amended ordinances associated with the adopted SUSMP is an appropriate request. The intent of the Tentative Order encompasses NPDES compliance and enforcement through local mechanisms. Local enforcement mechanisms to support the Tentative Order, such as ordinances, should be decided by each permittee. As written, the language conveys that the Regional Board has oversight authority over ordinances. The City requests this language be removed or revised.

The City of Temecula does not believe that it is appropriate to hold the City responsible for non-jurisdictional discharges from agencies comingling their jurisdictions within the city limits such as Caltrans, school districts, Eastern Municipal Water District/RCWD, etc. These agencies have NPDES permits/Waste Discharge Requirements and should be held accountable for their own discharges. The City requests this language reflect accountability to other agencies.

Section II. G. Construction:

The Tentative Order is requiring the City to assist in enforcing the State General permit for construction activities. In principle, the City shares the same goals of water quality as the Regional Board, however, the City does not agree with collateral assistance without an equitable reimbursement mechanism, especially since the SWRCB receives and retains all fees from the permitted construction activities and does not conduct visits at all sites. The Tentative Order requires the City to inspect construction sites that are already covered by State-issued permits. The Regional Board is supposed to inspect these sites, and state law does not allow it to delegate this authority. The City requests further discussions to reach a mutually agreeable solution to this discrepancy.

documents, evaluate their impact and inform management, elected officials and our community. The challenge of conducting the review has been compounded by the compliance requirements in the Colorado and Santa Ana Region MS4 Permits. During the review period Program staff were required to complete and submit an Annual Report for the Colorado Region MS4 Permit and continue to make progress in developing and implementing compliance programs. This includes the initial development of the WQMP, preparation of budgeting information for the Santa Ana Permittees, and preparation of significant comments on the Model Stormwater Monitoring Program for Municipal Urban Runoff Programs prepared by the Stormwater Monitoring Coalition. The District and Permittee staff commenting on this Tentative Order were also required to keep up with several committee and sub-committee meetings required by the various permits. All of this is in addition to continuing to implement the ongoing compliance programs.

During the last 14 years the Permittees and Regional Board have worked together to manage urban runoff quality in the permitted area. These efforts have resulted in the following accomplishments:

- Development of the Drainage Area Management Plan (DAMP) and Supporting Documents (Supplement A–New Development Guidelines, Enforcement Compliance Strategy and Municipal Facilities Strategy)
- Inspection of the storm drain system for illicit and illegal discharges
- Implementation of programs to control illicit and illegal discharges
- Implementation of public education program
- Implementation of Compliance/Assistance Program for industrial and commercial facilities
- Implementation of the Riverside County Consolidated Program for Water Quality Monitoring
- Participation in cooperative regional monitoring programs through the Southern California Monitoring Coalition in collaboration with Regions 4,8 and 9, Southern California Coastal Research Project and 6 other Southern California Phase 1 Municipal Programs

The existing urban runoff quality management program outlined in the DAMP and the Supporting Documents is effective and appropriate given the limited nature and significance of water quality problems associated with runoff from urban development in the Santa Margarita Region and only limited modifications to the DAMP are justified. These modifications were outlined in the Report of Waste Discharge submitted to the Regional Board in May 2003.

Although the Permittees and Regional Board have worked in a fiscally constrained environment with limited resources, this program has been notable in its effectiveness in managing runoff from urban areas in the Santa Margarita Region to protect receiving waters. Evidence of this effectiveness is that the single water quality impairment in the Santa Margarita Region identified by the Regional Board in the 2002 California 303(d) List and TMDL Priority Schedule is for phosphorous. However, even background conditions unaffected by urban or agricultural development exceed the Basin Plan objective for phosphorous. Given the effectiveness of the existing program and other local, State and Federal source control programs implemented in the Santa Margarita Region, no future water quality impairments associated with runoff from urban development are expected in the Santa Margarita Region.

Section II. H. Existing Development:

The City of Temecula believes the requirement to "implement" designated BMPs at private Commercial and Industrial facilities is excessive. Implementation of BMPs should be the responsibility of each facility. The City can designate BMPs and provide enforcement oversight, but cannot implement the BMPs for each facility. The Tentative Order also requires the City to inspect industrial and commercial sites that are already covered by State-issued permits. The Regional Board is supposed to inspect these facilities, and state law does not allow it to delegate this authority. The City requests the language pertinent to these concerns be removed or revised.

The City of Temecula believes the requirements regarding high-priority residential activities are not reasonable. It is inappropriate to expect the City to monitor or prohibit home/vehicle/garden care on a house-by-house basis and designate BMPs to all homeowners. The City is requesting that existing ordinances already regulating these activities be considered as the minimum BMPs that the City must designate.

Further, it is not fiscally or administratively prudent to require the revision or development of new ordinances to address minimum BMPs for commercial, industrial or residential activities within 365 days of permit adoption. The City requests that the requirements to revise ordinances to implement minimum BMPs be removed or that an extension of 270 days beyond the proposed 365-day schedule be provided to effectively complete implementation of this requirement.

Section II. I. Education:

The City of Temecula is committed to providing in-house training to municipal staff and providing educational material to the general public. In addition, the City is committed to providing guidance to site developers, business owners, and residents with respect to measures intended to achieve the objectives of the Clean Water Act and the Porter-Cologne Act. However, the City believes that it is unreasonable to be expected to provide a "measurable increase in knowledge" or a "measurable change in behavior" among the Construction, Industrial, Commercial, Residential, and Quasi-Governmental sectors, and to be exposed to enforcement actions if "measurable increase" or "measurable change" cannot be demonstrated. Individual NPDES permits, Waste Discharge Requirements, and the State's General permits do not contain requirements to effectively demonstrate a "measurable increase in knowledge" or "measurable change in behavior and such provisions in the Tentative Order are not justified. The City requests this language be revised or removed.

Section II. J. Illicit Detection and Elimination:

The Tentative Order specifies analytical monitoring of the MS4. The City of Temecula believes that this component should focus on identifying discharge sources, placing the responsibility of controlling or removing the discharge source on the discharger, and requiring sampling and remediation activities on the discharger. The City requests this language be removed, or revised to reflect this obligation on the discharger.

The City of Temecula is committed to assisting in containment-and-clean-up efforts due to sewage spills. However, the City cannot prevent such accidents from occurring. The City is concerned with the Tentative Order's requirement to "prevent, respond to, contain and cleanup" sewage spills and "prevent the contamination of surface water, groundwater and soil to the MEP". Sanitary sewers are part of publicly owned treatment works (POTWs). The duty to monitor, inspect and respond to sanitary sewer overflows rests with the operator of the POTW, not with those that do not operate a POTW. The local

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RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

January 28, 2004

Mr. John Robertus Executive Officer
California Regional Water Quality
Control Board – San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Dear Mr. Robertus:

Re: Tentative Order No. R9-2004-001
NPDES No. CAS0108766

The Riverside County Flood Control and Water Conservation District (District) is the Principal Permittee of the Riverside County Municipal Separate Storm Sewer System (MS4) Permit for the Santa Margarita Region. In cooperation with the Co-Permittees, the District has initiated a review of Tentative Order No. R9-2004-001, NPDES No. CAS0108766 (Tentative Order), Monitoring and Reporting Program (MRP Program) and the Fact Sheet. However, the changes to the MS4 Permit requirements proposed in the Tentative Order are extensive, and the corresponding compliance programs and the resource requirements needed to implement these programs are significant. Therefore, we are only able to submit initial comments at this time. Further, the 72-page Fact Sheet that provides the rationale for the proposed new and expanded requirements will require additional time and effort to review and evaluate. It is apparent that there are several factual errors in this sheet, including under-representation of Permittee Monitoring Costs and factual misrepresentations regarding industrial and commercial facilities that the Permittees currently inspect or propose to inspect.

Although the Permittees intend to present additional comments at the Regional Board hearing on February 11th and additional written comments by February 18th, the hearing schedule has not provided adequate time to prepare complete comments regarding the Fact Sheet and the Tentative Order. In addition, the hearing schedule has not provided adequate time to prepare, calendar and present staff reports on the Tentative Order to our elected officials. To provide adequate time for this important element of the public review and comment process, the Permittees request a second public review period and hearing following release of staff responses to the initial Permittee comments. Additional review time is needed to facilitate the development of an MS4 Permit that most efficiently promotes our goal of protecting water resources in the context of maintaining the ability of the County, Cities and District to provide other needed municipal services. This is especially critical at this time given the funding crises shared by the State and local governments. The County of Riverside alone is facing a $115 million shortfall next fiscal year due to the State budget crisis. At a time when local governments are cutting police and fire services, the Permittees find it difficult to support a significant expenditure on the expansion of an effective water quality management program in a watershed where there are no significant water quality problems or threats to public health and safety.

With the intervening holidays, the December 15, 2003 release date effectively provided the Permittees only four weeks to review these documents. This is inadequate time to review the

POTWs have been issued a separate State permit that should be enforced by the Regional Board. The City requests the tentative Order language reflect accountability to other agencies, including the Regional Board, or remove this requirement.

FACT SHEET

Sections VII.D and VII.E

The draft Fact Sheet states "...the Permittee will ultimately be held responsible for any discharges from the grading projects by the Regional Board...". The draft Fact Sheet also states "The Regional Board will assist municipalities...to bring the site into compliance". The City requests clarification of these statements.

The SWRCB receives fees, in part, through the issuance of NPDES General Permits for Construction Activities involving sites with land disturbances of 1-acre and more, as well as through the issuance of area-wide MS4 permits that require permittees to regulate discharges from construction sites. If the statements above are to be included in the Fact Sheet, then shouldn't a portion of the permitting fees that the SWRCB collects from developers be reimbursed to permittees assisting with the dual-regulating inspection efforts, especially if permittees are expected to accept liability for discharges from third-party construction projects? If partial assistance is the extent of participation by the SWRCB, then permitting fees should be equitably distributed among all participating entities.

Section VIII.B.3

The draft Fact Sheet states, "The Permittees have not provided monitoring data...threat to water quality". The Permittees have not been required to provide monitoring data that does or does not support USEPA's conclusion that street wash water poses a threat to water quality. Further, the City is not unaware of either the generation or discharge of "street wash water" to the MS4s owned and operated by any of the Permittees within the Riverside County SMR area nor has Regional Board staff provided any data to support that this activity is occurring within Riverside County SMR area. This sentence should be removed from the draft Fact Sheet.

The Fact Sheet states, "Pursuant to Requirement B.1...separate NPDES permit".

Clarity requested. Can the Regional Board prohibit discharge-categories that are not listed in Requirement B.2? It appears that an implied prohibition is effected by simply not granting an NPDES permit. This paragraph should be revised or removed.

Section VIII.D.1

The draft Fact Sheet states "...Permittees shall develop and implement legal authority...or similar means...".

Clarity requested. This statement indicates that the Tentative Order requirements may be included in guidance manuals or policy documents, but not necessarily as ordinances. The City requests that the Tentative Order language be revised to exclude ordinances as the sole source of legal authority.